United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

865

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,676

RUBY C. BOURNE
Appellant

v.

FAWAN WASHBURN

and

JAMES A. KEENER
Appellees

Appeal from the United States District

Court for the District of Columbia

BRIEF ON BEHALF OF THE APPELLANT

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

I.

STATEMENT OF ISSUES PRESENTED

1. The jury award to the Plaintiff was inadequate as a matter of law, and the Trial Court erred and abused its discretion in not granting Plaintiff's motion for a new trial.

2. The verdict rendered by the jury was a compromise verdict, and the Trial Court erred in not overturning it.

3. The trial record shows that the Trial Court was prejudiced against the Plaintiff, thereby denying the Plaintiff a just result.

This case has not been before this Court previously.

II.

REFERENCES TO RULING

Pursuant to Appeals Court Rule 8(f), the Appellant states that there are no specific rulings, opinions, memoranda, findings or conclusions, either oral or written, which are presented for review and which, therefore, should be read by this Honorable Court. However, the Honorable Court is requested to read the Trial Court's comments at the following pages of the Record which indicate a prejudice against the Plaintiff: 152 164, 196, 197, 311 and 312.

Additionally, the following rulings were made by the

Trial Court during trial:

The Trial Court ruled individually on the admissibility of Plaintiff's Exhibits 1 through 23 at the pages shown on the Record Indices at pages 2, 176 and 305. These exhibits are doctor and hospital statements for medication and medical services rendered.

At pages 161 and 162 of the Record, the Trial Court ruled that diagnostic reports of Doctors Groh and Luessenhop were inadmissible on the basis that the Doctors themselves should testify so that cross-examination could be conducted.

At page 180 of the Record the Trial Court ruled that Dr. Stevens would be called to testify as the Court's witness.

At page 267 of the Record, the Trial Court denied Defendant Keener's motion for directed verdict in his favor.

At page 296 the Trial Court overruled Plaintiff's objection to Dr. Novak's testimony regarding D.C. General Hospital records on the

ground that the hospital records needed medically expert interpretation.

At page 307 of the Record, the Trial Court ruled inadmissible the Report of the Mental Health Commission Hearing held to determine the mental competency of the Plaintiff. The report was excluded on the grounds that a proper foundation for its admission had not been established.

At page 311 of the Record the Trial Court ruled that it would not submit a list of special damages claimed to the jury as was its usual practice since, "the whole matter is in dispute."

On page 313 of the Record the Trial Court ruled that Defendant's request for Jury Instruction No. 1 would not be allowed.

On page 319 of the Record the Trial Court ruled Plaintiff's Requests 1, 3 and 4 would not be allowed for the reasons that No. 1 was moot, No. 3 was not applicable, and No. 4 was not proper in that it requested recovery for costs of future treatment.

III.

STATEMENT OF THE CASE

The Plaintiff - Appellant, Ruby C. Bourne, hereinafter called the Plaintiff, filed suit in the United States District Court for the District of Columbia on July 20, 1962 against Defendants, Alice Langhorn Washburn, III (alias Fawan Washburn) (R. 8)[1/] and James Arthur Keener (R. 32) for injuries sustained November 2, 1959 allegedly resulting from an automobile collision.

The accident occurred on November 2, 1959 (R. 32 - 46), at 10:45 p.m. (R. 53 - 57), at New Hampshire and S Streets, N.W., Washington, D.C. (R. 53).

The Plaintiff was a passenger in the car of the Defendant Washburn (R. 72).

The trial commenced on November 17, 1967 (R. 1), and ended November 21, 1967 (R. 357).

The evidence at trial consisted of the testimony of the parties (R. 8, 31, 71), of the police officer called to the scene of the accident (R. 257) and of five doctors called as medical experts - namely, Dr. Saul Holtzman (R. 115),

1/ R. will be used hereinafter to designate the trial transcript record.

Dr. Hugo Rizzoli (R. 181), Dr. Robert Groh (R. 247), Dr. William Novak (R. 292), and Dr. Harold Stevens (R. 326).

Additionally, there were stipulations between the parties regarding the testimony of other expert medical witnesses - specifically, Dr. William T. Spence (R. 273), Dr. Alfred Luessenhop (R. 273), Dr. Joseph T. Kaye (R. 280) and Dr. James L. Foy (R. 284).

The exhibits in the case comprise Plaintiff's exhibits 1 through 23, showing hospital and doctors' bills accrued as a result of treatments and medication prescribed by various doctors during the period from November 1959 through 1966. (R. 2, 176, 305).

The jury rendered special verdicts finding the Defendant Keener not liable; finding Defendant Washburn liable; and fixing the amount of damages recoverable by Plaintiff from Defendant Washburn at $3,000.00 (R. 357, 358).

The Plaintiff, after verdict, moved pro se for a new trial on the ground that the verdicts were contrary to the evidence, which Judge Holtzoff denied.

Thereafter, the Plaintiff filed a Notice of Appeal with the United States Court of Appeals, District of Columbia Circuit and petitioned that she be permitted to appeal in forma pauperis. By an order of this Court dated November 8,

1968, the Appellant was granted leave to proceed further without prepayment of fees and costs.

On January 3, 1969, this Court appointed Henry W. Leeds as counsel to represent the Plaintiff. On June 18, 1969, it was moved that J. Timothy Hobbs be appointed co-counsel with Mr. Leeds.

The Plaintiff does not appeal from the Jury's decision that the Defendant Keener is not liable; nor does the Plaintiff appeal from the jury's finding that the Defendant Washburn is liable. The appeal is primarily directed to the inadequacy of the damage award as a matter of law. The appeal is also predicated on prejudice of the trial judge in favor of the Defendant, resulting in a denial of a fair trial to the Plaintiff.

Since there is no question regarding the non-liability of the Defendant Keener, this brief will hereinafter use the term "Defendant" to refer solely to Miss Washburn unless a contrary meaning is clear from the text.

To place the appeal in its proper context on the question of damages, it is necessary to set forth briefly the medical history of the Plaintiff.

The accident in question occurred on November 2, 1959

(R. 32 - 46). The Plaintiff was a passenger in the automobile of the Defendant (R. 72). On impact, the Plaintiff bounced to the top of the Defendant's car, and then bounced back and forward in the car (R. 73). At the scene of the accident, she had severe pain in her neck, was taken to the Washington Hospital Center in an ambulance, admitted to the emergency room, treated by an intern, and dismissed. (R. 74, 75)

On November 3, 1959, the Plaintiff was taken by the Defendant to see Dr. Saul Holtzman (R. 76). Dr. Holtzman treated the Plaintiff until March 1962 (R. 110). During this time, the Plaintiff visited Dr. Holtzman 235 times, and called him more than 100 times (R. 120).

Dr. Holtzman had examined the Plaintiff in March 1959 prior to the November 2, 1959 accident (R. 136). At that time, his opinion was that the Plaintiff's medical history had been good, she was hard working, had no operations, used only social alcohol, smoked but did not sleep well (R. 136).

Dr. Holtzman diagnosed the injury to the Plaintiff as a fairly severe sprain primarily in the neck and back, followed by a conversion hysteria or traumatic neurosis (R. 128 - 129), which is very difficult to treat, and may go on indefinitely (R. 130, 141).

Dr. Holtzman hospitalized the Plaintiff in the Washington Hospital Center from November 5, to November 21, 1959, where she received daily physiotherapy and regular prescribed medication (R. 78, 79).

On June 9, 1960, Dr. Holtzman referred the Plaintiff to Dr. Robert Groh, a doctor of neurology and psychiatry (R. 248). Dr. Groh performed a complete clinical neurological examination on the Plaintiff, which showed that she was normal, but that her neck muscles were painful to the touch (R. 249, 252). Dr. Groh reported to Dr. Holtzman that the Plaintiff's problem had developed a strong emotional overlay (R. 253).

Dr. Holtzman then had the Plaintiff hospitalized at the Washington Hospital Center from June 16, 1960 to July 10, 1960 (R. 92, 93). During this period, she was placed in head traction, being removed therefrom only for meals and toilet (R. 93).

After continuing treatment by Dr. Holtzman, the Plaintiff was sent by the Doctor to see Dr. Hugo Rizzoli on January 3, 1961 (R. 101, 182). Dr. Rizzoli found that the Plaintiff had spasms of the paravertibal muscles, a sprain of the cervical spine (neck), and a considerable degree of emotional overlay (R. 185 - 187). The sprain was the residual of the

November 2, 1959 injury (R. 187).

On September 5, 1961 Dr. Holtzman again hospitalized the Plaintiff at the Washington Hospital Center (R. 103). She received pelvic traction and medication at the hospital and was dismissed on November 2, 1961 (R. 103, 104), and sent on the same day to Georgetown Hospital where she was under the care of Dr. Alfred J. Leussenhop (R. 105 - 107). She was dismissed on November 14, 1961. (R. 108). Dr. Leussenhop's report advised that the Plaintiff take a psychiatric examination since she was suffering from a conversion reaction (R. 279). The Plaintiff refused to take this examination (R. 279).

The Plaintiff continued seeing Dr. Holtzman until March 1962 (R. 109, 110).

On April 10, 1962 the Plaintiff was admitted to the National Orthopedic Hospital, Arlington, Virginia. (R. 110, 111). She stayed at this hospital until May 19, 1962, during which she received more traction, whirlpool baths, shoulder injections, and she was required to wear a body cast during some of the time (R. 111, 112, 114).

Two weeks after being released from the National Orthopedic Hospital, the Plaintiff was admitted to D. C. General Hospital on June 4, 1962 (R. 115) where she spent the next six months, being discharged on December 8, 1962 (R. 166, 170).

At D.C. General she received daily physiotherapy, head traction, bed exercises, and had performed on her a spinal tap and a third myelogram (R. 171, 172).

Upon discharge from D.C. General Hospital, the Plaintiff went in December 1962 to live with her sister in San Pedro, California, where she stayed until April 1967 (R. 208).

In California, the Plaintiff continued medical treatment with Dr. Paul Smith, (R. 210), Dr. Bacon (R. 211), and Dr. Lambertson (R. 221). She also saw Dr. Edward J. Waiter (R. 222,223) and Dr. Moscowitz (R. 223), who put her in the Los Altos Hospital, Long Beach, California from July 1 to July 19, 1966 (R. 224).

Upon returning to Washington, in April 1967, the Plaintiff again saw Dr. Holtzman, who recommended psychiatric treatment (R. 142). The Plaintiff, however, proceeded to take dynawave and microthermal treatment from Dr. McCann from June 27, 1967 through August 1967 (R. 225).

Dr. Rizzoli saw the Plaintiff again on October 10, 1967. On this second visit, the residual sprain from the November 2, 1959 accident continued but there was a significant increase in the degree of the Plaintiff's emotional overlay (R. 193). The emotional overlay was manifested

objectively by the partial immobility of the Plaintiff's left arm and neck, and a glove-type sensory loss in her left arm (R. 205).

To summarize the factual background, the Plaintiff has had extensive medical attention. There is no question that she was injured in the automobile accident on November 2, 1959. It is also clear that the accident precipitated an emotional overlay or conversion reaction, conversion hysteria, or traumatic neurosis, which has manifested itself in continuing and aggrevated pain. On these facts and notwithstanding the record which establishes medical bills of $12,589.72, the jury awarded the Plaintiff $3,000.00.

IV.

ARGUMENT

A. THE JURY AWARD TO THE PLAINTIFF WAS INADEQUATE AS A MATTER OF LAW, AND THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL.

For Argument A, the Court is requested to read the testimony of the Plaintiff and of the medical experts, which appears at: R.71 through 256 and 292 through 338. Additionally, the Court is requested to read the Trial Court's colloquy and instructions to the jury from pages 341 through 359.

1. THERE IS NO BASIS IN THE RECORD FOR THE JURY AWARD OF DAMAGES IN THE AMOUNT OF $3,000.00.

Three questions were submitted to the jury by the Trial Court:

1) Was the Defendant, Washburn, guilty of any negligence which was the proximate cause or one of the proximate causes of the accident? (R. 350)

2) Was the Defendant, Keener, guilty of any negligence which was the proximate cause or one of the proximate causes of the accident? (R. 350)

3) What amount of damages did Plaintiff sustain as a result of the accident? (R. 350)

The jury, in rendering its verdict, held "yes" on question No. 1; "no" on question No. 2; and "three thousand dollars" on question No. 3. (R. 357, 358)

The Plaintiff contends that the trial record conclusively shows a casual relationship between the negligent act of the Defendant, Washburn, and damages to the Plaintiff far in excess of $3,000.00. Therefore, the jury, after finding liability to exist, acted contrary to right reason in limiting the Plaintiff to an award of only $3,000.00.

The pertinent law is clear: the wrongdoer takes his victim as he finds him. Thomas v. United States, 327 F.2d 379 (7th Cir. 1964), citing, Seavey, "Principles of Torts," 56 Harvard L.Rev. 72 (1942).

Specifically, if a wrongdoer commits a tort upon

a person having a pre-existing psychic weakness, the wrong-doer is liable for all injuries caused by his act, including secondary ones growing out of the victim's psychic weakness. Parrish v. United States, 126 App. D.C. 144, 375 F.2d 320, 321 (D.C. Cir. 1967); Hamilan Corporation v. O'Neill, 106 App. D.C. 354, 273 F.2d 89, 90 (D.C. Cir. 1959); Thomas v. United States, supra, Stackpole v. Northern Pacific Railroad Company, 121 Fed. 389 (C.C.D. Ore. 1903); Dahl et al. v. Moac Service, 112 F.Supp. 499 (E.D.N.Y. 1953); Fisher v. Small, 166 A.2d 744 (D.C. Munic. Ct. App. 1960); Huyler v. The City of Chicago, 62 N.E.2d 574 (Ill. App. 3d Div. 1945); Fox v. Keystone Telephone Company, 326 Pa. 420, 192 A. 116 (Sup. Ct. Pa. 1937). This principle is the touchstone of the Plaintiff's appeal.

In Parrish v. United States, supra, the Court of Appeals for the District of Columbia Circuit at p. 321:

> "The District Court concluded that, under the law of this jurisdiction, only a 'substantial' physical injury could be made the occasion for an award of damages in respect of a consequent nervous disorder and found the physical injuries involved not to be substantial. The District Court thereupon determined, as a matter of law, that the neurotic condition could not under any circumstances be compensable. We disagreed and remanded the case to the District Court for reconsideration in the light of our opinion and for a finding whether appellant's alleged psychiatric disorders were a proximate result of the physical injuries sustained. The

> District Court was directed that, if an affirmative finding was made, the issue of damages was also to be re-examined." (Plaintiff's emphasis)

In Thomas v. U.S., supra, the Plaintiff appealed from a judgment of $11,321.20 in her personal injury action under the Federal Tort Claims Act. The ground of the appeal was the inadequacy of the award for pain and suffering.

The record showed that three years before the occurrence the Plaintiff was hospitalized and treated for six months for a "psycho-neurotic reaction, depressive reaction." She was discharged, "treatment completed, not mentally ill." After her discharge from the hospital she worked steadily to support herself and her children. She was given increased responsibility by her employers and periodic pay raises, and during this period of employment she sought medical attention only on two occasions, once for a monor ear infection and once for a wrenched ankle. The injuries inflicted by the wrongdoer were a substantial factor in arousing the Plaintiff's dormant "psycho-neurotic depressive reaction." She suffered pain for more than two years and wore a neck brace for more than six months. She was hospitalized three times following the accident and was unable to return to work for two years.

The Trial Court, on the basis of such evidence,

granted an award, but limited recovery for pain and suffering to a nominal $100.00, on the theory that her psychological weakness produced some gratification for the Plaintiff that should be balanced against actual pain and suffering.

The Appellate Court affirmed the Trial Court's allowance for damages of $7,685 for lost earnings and $3,536.20 for medical expenses resulting from the psycho-neurotic reaction, but increased the amount for pain and suffering from $100 to nearly $8,000.00 bringing the total award to $18,500.

In so holding, the Court said, at 327 F.2d, page 381:

> "We take this evidence to mean that the superimposition of physical injuries upon her psychic problem increased her anxieties to such an extent that she could no longer keep them under control, and as a result, she underwent a more extreme reaction than would normally follow. Her marked hypochondriasis or inclination to refer anxieties to physical sources does not warrant the inference that she receive 'enjoyment' or 'gratification' from the pain caused by her injuries. . .
>
> "The Government argued in support of the Court's ruling that there are some elements of pain, real enough to the victim, which are the natural and probable consequences of the Defendant's negligence, but which are never-the less not compensable in law because of the Plaintiff's perculiar psychological make up. On the contrary, the tortfeasor takes the victim as he finds him. Until the sciences of law, psychiatry and psychology co-develop to the state at which there is a

> fuller understanding of human pain and suffering, we think it unwise to formulate a rule of damages which reduces the compensation for an injured Plaintiff to a 'net' after crediting the tortfeasor with a secondary effect of the injury due to Plaintiff's psychic weakness, aroused by the injury . . .
>
> "The (Trial) Court found that Plaintiff received 'medical attention' from doctors, including specialists, on the occasion of three extended periods of hospitalization and a rehabilitation course aimed at both a cure for her physical ails and her mental problem. She was wholly and totally unable to return to her employment for about two years during which she suffered pain. We think a fair allowance for pain and suffering would increase this judgment from $11,321.00 to $18,500."

Beside awarding damages for pain and suffering, it must be noted that the Court in the Thomas case also awarded full compensation for all hospitalization expenses and for all expenses due to lost earnings, which were caused by activation of the Plaintiff's pre-existing psychic weakness.

In the case of Dahl et al. v. Moac Service, supra, the Plaintiff sustained whip lash injuries when a cab in which she was riding was hit from behind, resulting in aggravation of a pre-existing weakness which caused "post-concussion syndrome." The Appellate Court upheld the Trial Court's award despite Defendant's argument that present troubles arose from a premenopause condition.

In Fisher v. Small, supra, the Appellate Court refused to overturn a jury award for the Plaintiff for aggravation of a pre-existing condition. The Plaintiff was struck by falling glass. Long after, she suffered black-outs, dizziness, tension headaches, and even loss of hair. The award was upheld even in the presence of evidence which showed that some of the symptoms complained of were present before the traumatic experience.

In Fox v. Keystone Telephone Company, supra, a new trial was ordered where the explosion of a telephone receiver in the Plaintiff's ear resulted later in impaired hearing, nervous exhaustion, a saliva condition, hemmorages, and vomiting spells, for which the Trial Court had refused to grant relief.

Each of the above-cited cases clearly illustrates that where the tortfeasor, by his act, aggravates a pre-existing psychic condition, which in turn results in abnormal secondary injuries, he stands liable for those injuries as well as for the direct injuries resulting from his act.

In the case at bar, the uncontradicted evidence shows that, through the time of trial, the Plaintiff was suffering continuing injuries directly and proximately

caused by the Defendant Washburn's negligent act; that a "compensated" neurosis, dormant in the Plaintiff, was traumatized and activated by the auto collision caused by the Defendant Washburn that said traumatic neurosis produced protracted secondary effect, which in turn, caused the Plaintiff continued loss of earnings, hospital expenses, pain and suffering, for which she now prays relief and compensation.

The corroborative testimony of the five doctors demonstrates the medical effects of the Defendant Washburn's tortious act.

Dr. Holtzman is the only doctor who testified who treated the Plaintiff and had an opportunity to observe her before the accident.

Miss Bourne first saw Dr. Holtzman in March of 1959 (R. 131). He saw her after the accident at issue continuously from November 3, 1959 through March of 1962. (R. 120). Dr. Holtzman estimated that during this two and one half (2½) year period he saw the Plaintiff 235 times and had about 100 telephone conversations with her. (R. 120) Restated, he saw the Plaintiff approximately every four days for 2½ years, with at least one telephone call between each visit.

Concerning the Plaintiff's background prior to the Defendant's tortious act, Dr. Holtzman testified upon cross examination, at R. 131:

> Q Did you go into Miss Bourne's background in any way?
>
> A Well, I knew that she came from a family of many children, and as I understand, 17; that she was a native of Barbados and had come to Washington.
>
> As you may know, I have treated her before this accident and at that time, referring to my notes, she gave symptoms of just general symptoms of being tired, talked about changing jobs, which is not unusual in patients; and at that time when I first saw her, which was in March of 1959, I made a complete examination of her and couldn't uncover anything that indicated she was emotionally upset.

And at Record p. 132:

> Q My question, doctor, is: did you make any inquiry or investigation into her background to explain the emotional problem which she had?
>
> A This is a summation of what I said.
>
> Q You mentioned two things that occurred prior to the accident. One is that you had been treating her and two, that you learned that she came from a large family in Barbados?
>
> A Yes, Sir.
>
> Q Do you think that the large family had anything to do with her emotional problem?
>
> A I wouldn't know. I couldn't say.
>
> Q Can we agree, Doctor, that the traumatic neurosis, the neurosis must exist prior to the accident? Do we agree on this?

A Yes; compensated neurosis, I would qualify.

Q So in this case we had a neurotic individual that was injured?

A Yes, Sir.

And at R. 128 Dr. Holtzman, after examining the Plaintiff subsequent to her injury, gave this diagnosis of the Plaintiff's condition:

Q You had this lady under your care, then, from the beginning of November, 1959 up until the later part of March, 1962. Did you reach a diagnosis of her injuries and her condition?

A Yes. . .I felt that she had been injured in the accident, sustained a sprain fairly severe, of the neck primarily, also the back but that apparently cleared; that this was followed by a conversion hysteria or other equivalent term would be traumatic neurosis.

Q What does that mean?

THE COURT: Will you explain that in non-technical language? What is it?

A Well, traumatic neurosis or conversion hysteria are pretty much the same, just different doctors use different terms. It's a psycho-neurosis. It's a disturbance of the psyche. It's a problem in which an unstable or inadequate or an emotionally disturbed person who has controlled their problems or their conflicts to the degree that they can get along with society and work, suddenly something precipitates a break down. In this case, trauma, traumatic. And as a result a picture, a clinical picture, a series of activities or actions develops which is fairly characteristic. It results in an exaggeration of the patient's complaints.

Now all of this is all unknowingly, this is not lingering, this is not willingly. A

> conversion, they transform or transfer the emotional problems that they have had into these physical ailments. In this particular case, continued neck pain, severe headaches, partial paralysis of the left arm or great weakness of the left arm. These patients also exhibit a great deal of anxiety, which is a form of fear and apprehension. This also again in an exaggerated form. And as a result, you get a picture of a person having physical ailments where actually they are manifestations of an emotional disturbance.
>
> Notoriously, they are difficult to treat, very stubborn and very cronic.

Additionally, Dr. Holtzman had referred Miss Bourne to several doctors who reported to him upon her condition. These reports, one by a Dr. Morris, and another by a Dr. Rizzoli corroborate the opinion of Dr. Holtzman that Miss Bourne, living with a compensated, controlled neurosis prior to the accident, experienced such trauma by the accident that her neuroses were activated, resulting in secondary manifestations which caused continued damages. (R. 145, 146).

In the course of Dr. Holtzman's testimony, the Court evinced some confusion as to the exact import to be given pain and suffering resulting from a traumatic neurosis. At p. 164, the Court said:

> But, Doctor, I want to get away from science for a moment. I am a plain, blunt man and I like simple explanations.
>
> Do all these terms that we have been discussing

like traumatic neurosis and conversion hysteria and so on mean that the Plaintiff imagines that he or she has pains <u>that do not exist?</u> (Plaintiff's emphasis)

WITNESS. That is right, Sir.

THE COURT. Very well.

Later, Dr. Holtzman explained the "imaginary" pain referred to above at p. 167:

Q (By Plaintiff's Counsel) Doctor, the pain which you stated in response to His Honor's question as being imaginary pain to the patient, is this pain, even if imaginary, something that she really feels? Is it pain to her?

A Yes, it's pain to her. Let's say that she may not interpret it as pain, but she will interpret it as suffering, the equivalent of pain, some type of suffering.

The Plaintiff was referred to Dr. Groh on June 9, 1960, by Dr. Holtzman for the purposes of further examination and diagnosis of her condition. Of his examination and diagnosis of the Plaintiff, Dr. Groh testified (R. 253):

"I reported to Dr. Holtzman that I could find no evidence of organic neurologic disease and from her appearance and her statements I felt it was a rather strong emotional overlay in this problem she was having . . ."

A Dr. William Novak, a psychiatrist practicing in the District of Columbia, testified on behalf of the Defendant concerning ~~his~~ The treatment of the Plaintiff when she was a patient in D.C. General Hospital on and after

June 30, 1962 (R. 293, 294). Dr. Novak never treated the Plaintiff! (R. 295). Dr. Novak testified that a lessening of pain was observed in the Plaintiff when she was administered placebos, in this case, sterile water injections. (R. 298).

Regarding the causation of the Plaintiff's pain, Dr. Novak testified: (R. 302)

> Q (By Plaintiff's counsel) Doctor, you say the patient imagines that she has a pain, is this a voluntary type of thing on the patient's part, or is it a result of an injury superimposed upon an individual who might be a bit weak?
>
> A That's why I hesitated with Mr. Thompson's question. The question becomes one - we are looking at the word "imaginary" - the question becomes: Is this something conscious, or is this something unconscious? And the possibilities are that such pain could be - I'll say could be consciously fabricated, could be consciously, there could be a conscious intent with the absence of pain. Or there could be some pain that is produced unconsciously, automatically, in the same way that perhaps if I am blushing now, I might be blushing for some reason about which I am unaware, I wouldn't necessarily know why I had that reaction, but I might have it. So that the pain can be the result of something automatic, or something conscious and premeditative.
>
> Q Now, this subconscious type of pain to which you refer, you doctors also sometimes describe it as a somatic situation, somatic pain?
>
> A No. The somatic pain comes primarily from the soma, from the body. It's a real pain, causing organic pain. Somatic pain may be pain that is created primarily by some unconscious kind of conflicts.

Q I see. And did you make any determination as to whether Miss Bourne had any of this psychosomatic pain?

A As I try to reconstruct my thinking from that time and reread my notes, I did have the feeling, based on my experience with Miss Bourne, and based on what I read from the chart, that I could not explain the pain on the basis of an organic illness. I had the feeling that this was a psychologically induced pain.

Dr. Novak's testimony is important because it establishes that, in 1962, Miss Bourne's painful, debilitating condition was being caused by unconscious psychosomatic or psychologic factors, which, as shown by Doctors Holtzman and Rizzoli, were produced by the Defendant Washburn's negligent act. The Plaintiff was not malingering or faking her pain.

Dr. Harold Stevens was called as a Court's witness to testify regarding his independent investigation of the Plaintiff on June 28, 1967, more than seven (7) years after the automobile collision. (R. 329, 330).

On the basis of his single examination, Dr. Stevens stated, (R. 329, 330):

> "This constituted my examination and review of history, and from this data I expressed the opinion that Miss Bourne is free of any organic disease of the central or peripheral nervous system. There is no evidence of any brain damage. If she suffered a cerebral concussion, it was a minor one and produced no sequelae. That is, no consequences.

> It is my further opinion that she has a conspicuous, conscious element present in her psychological complaints, and it was my opinion that this pattern of injury was not likely to produce a traumatic neurosis. There is no evidence now nor in the record that she suffers or suffered from any psychosis."

Thus there appears for the first and only time in the Record, testimony of a medical nature that Miss Bourne's illness was possibly caused by a conscious element in her complaints. However, Dr. Stevens's conclusion does not establish that there is no psychological basis to her complaints. His conclusion is ambiguous, tentative, and without extended and close examination of the Plaintiff over a period of time. It does not mean that the Plaintiff was malingering.

Dr. Stevens based his opinion on two factors:

1) That Miss Bourne responded favorably to placebos given her at various times (R. 329), and,

2) That during his examination, Miss Bourne's symptoms were exaggerated, yet, during periods when she was not being examined, she had no difficulty in manipulating her left hand and head. (R. 332)

It must be noted, however, that, as Dr. Novak explained, positive reactions to placebos could result if pain is produced by psychologic or neurotic factors

(R. 302, 303). Furthermore, the fact that the Plaintiff experienced pain and paralysis during examination, yet appeared to function normally when not being examined is not unusual where the pain and suffering are psychological in origin.

In Stackpole v. Northern Pacific Railroad Company, 121 Fed. 389 (C.C.D. Ore. 1903), the Plaintiff, experienced physical pain after a fall on the Defendant's railroad. Later she developed a stiffness in her foot which increased in time to the point that the foot became paralyzed. She sued the Defendant, alleging that as a result of a conversion hysteria the initial direct injury was multiplied into grievous secondary injuries through a neurosis, for which she should recover from the Defendant.

The Defendant in the Stackpole case adduced testimony that the Plaintiff was unable to move her foot during a medical examination, but after the examination and when the doctor engaged her in normal conversation, her foot returned to normal and could be manipulated. The Defendant used this evidence to show that the Plaintiff was malingering, or faking her injury, and thus should not recover.

The Court, in holding for the Plaintiff in the

Stackpole case said at 121 Fed., at 395:

> But this explanation does not account for the fact that the foot was absolutely rigid and straight when under examination, resisting all efforts to flex it by force and that it was only when the Plaintiff's attention was diverted for a considerable time, and when the foot was not under observation, that its condition became normal. As already stated, contractures may often be made to relax by suggestion and it may be that the conversation by which Plaintiff's mind was diverted from her condition operated, by way of suggestion, to produce the conduct mentioned.

The Court, in Stackpole, said in effect that merely because symptoms are exaggerated during examination does not necessarily mean that the Plaintiff is malingering or faking an injury; and that this exaggeration, in the presence of a physic illness, need not preclude a Plaintiff's recovery.

Finally, there is the testimony of Dr. Rizzoli who examined the Plaintiff at the request of Dr. Holtzman, in January, 1961, over a year after the accident (R. 182). He performed a series of physical and neurological examinations. His diagnosis is in the record as follows (R. 187):

> Q Did you arrive at a diagnosis or an impression of this patient's condition?
>
> A It was my opinion at the time that the patient had residuals of the strain of the servical spine plus a considerable degree of emotional overlay.
>
> I further went on to say that I doubted

that she had a cervical disk but that in view of her complaints of severe pain I felt that she should have a cervical myelogram.

And again at p. 187:

Q From the history that you had been given of the method of the collision that had occurred, the manner of the collision that had occurred, would you, based upon your examination of this lady and your knowledge of the structures of the neck area, give the opinion that this was the residual of the injuries sustained in November of 1959?

A Yes.

And at p. 188:

THE COURT: (. . .what is the meaning of the words "emotional overlay?")

THE WITNESS: By this I mean that the patient's reaction to the organic injury seemed more than I would expect from a person who was assumed to have a normal degree of emotional stability.

Over six (6) years later, Dr. Rizzoli examined the Plaintiff and found her still suffering pain from the November 1959 accident. Specifically, he testified (R. 191):

Q When you examined her or saw her in October of 1967, did you examine her for the purpose of treatment?

A This was my understanding. As a matter of fact my associate was treating her, and she asked to see me.

Q And when you saw her on that date, did she at that time have any complaints that you related to the prior times you had seen her?

A Yes.

Q What were those complaints, and if you examined her, what did you find and what did you do for her?

A Well, on the 10th of October, 1967, she indicated that she continued to have exacerbations of pain in the neck and left arm. She indicated that she had only worked part-time from time to time since I saw her in 1961. She complained primarily of pain in the neck, left shoulder, left arm, inability to use her hand properly and some pain in the low back.

At R. 193 Dr. Rizzoli continues:

Q Did you arrive at an opinion or diagnosis or impression of her condition?

A Yes. In addition, she was having low back pain. I felt to some degree her pain was on a rheumatoid basis. In addition, it was my opinion that there was a significant degree of anxiety reaction or emotional overlay.

Q This anxiety reaction or emotional overlay you had previously found when you saw her back in '61, is that correct?

A Yes.

And at p. 205 of the Record:

Q Doctor, in your examination on October 10, 1967, did you find any significant degree of emotional overlay still present?

A Yes, I felt there was.

Q Based upon your knowledge of the patient when you examined her on the 3rd of January, 1961, and when you examined her on the 10th of October, 1967, would you say that this emotional overlay had increased, decreased or remained the same?

A Well, I think it was manifesting itself with

> more objective signs, if you will, now. I mean she was keeping her arm immobile and she was using it less well now than when she was then, and the sensory changes we found at this time were more characteristic of the emotional overlay than in 1961, because I don't believe I found any sensory changes then. (Plaintiff's emphasis)

The testimony by Dr. Rizzoli shows unequivocally that the results of the traumatic neurosis caused by the Defendant's tortious act, were manifesting themselves continuously through October 10, 1967, the date of Dr. Rizzoli's last examination just prior to trial. Restated, the Defendant's tortious act was the direct and proximate cause of the Appellant's loss of earnings, hospitalization expenses, pain and suffering from the date of the accident in 1959 through October of 1967, just prior to trial.

Therefore, in conclusion of argument No. 1, the law in the District of Columbia is that a Plaintiff may recover all damages caused by the Defendant's negligent act, including secondary damages arising from aggravation of a pre-existing neurotic weakness.

The testimony of the doctors who testified at trial shows that the overwhelming weight of evidence was in the Plaintiff's favor; that there was a direct causal

connection between the Defendant's tortious act and the damages sustained by the Appellant from the time of the collision in 1959 well into 1967; that the hospital expenses, loss of income, pain and suffering during the entire period are directly attributable to the Defendant's act, and that the jury acted contrary to right reason in limiting its award to $3,000.00.

2. PLAINTIFF'S DAMAGES

Plaintiff's exhibits in the record, 1 through 23 are comprised exclusively of hospital and doctor bills submitted for medical services and treatment arising from the injuries complained of. The hospital statements dated from November, 1959, through July, 1966, totalled $12,589.72.

During the period subsequent to the auto collision the Plaintiff was forced to stop working due to her extreme pain and paralysis. The time thus lost is summarized below:

RECORD PAGES	DATE	WEEKS OF WORK LOST
89, 95, 96, 97, 102, 103	11/5/59 - 11/2/61	66
109	11/14/61 - 4/3/63	77

RECORD PAGES	DATE	WEEKS OF WORK LOST
213	1964	19
219	1965	14
220	1966	34
220	1967	~~40~~
	TOTAL	250 Weeks

During the period from 1959 through 1961 the Plaintiff, when she did work, earned at the rate of approximately $80.00 per week (R. 89). The Plaintiff, when she worked, during the period 1964 through 1967, earned at the rate of approximately $100.00 per week (R. 214). Thus, from the time of the accident in November 1959 to the time of the trial in October 1967, the Plaintiff's lost wages were $22,140.00.

Considering only the Plaintiff's hospital expenses and her lost wages of $22,140.00, her proven ~~expenses~~ damages exceeded $34,600.00, but the jury awarded her only $3,000.00!

Leaving aside the question of pain and suffering (which has been considerable) and the fact that the Plaintiff's injuries may be permanent, it is manifest that gross injustice has been dispensed in the Plaintiff's case. A new trial must be ordered solely to determine the exact amount of damages due her.

3. TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING A NEW TRIAL.

The law in the District of Columbia is clear that a jury award must be inadequate as a matter of law before a new trial will be granted. The Court in Somerville v. Capital Transit Company, 89 App. D.C. 343, 192 F.2d 413 (D.C. Cir. 1952) said, at p. 414:

> It is a familiar principle that the grant or denial of a new trial rests in the sound discretion of the Trial Judge and that the exercise of this discretion will not be disturbed on review except for abuse. (Citing cases) Abuse is ordinarily established by showing the Trial Court acted without authority, . . . for an erroneous reason, . . . or arbitrarily and without justification in light of all circumstances as shown by a review of the Record as a whole . . .

It is the Plaintiff's position that the Trial Court, in denying its motion for a new trial, acted arbitrarily and without justification in light of all the circumstances as shown by a review of the Record as a whole.

The question of Defendant Washburn's liability was definitely established by special verdict in favor of the Plaintiff. The uncontradicted evidence demonstrated that Plaintiff's money damage allegedly arising from the

Defendant's acts was at least $34,600.00. Yet, the jury, contrary to all right reason, granted the Plaintiff's recovery of a mere $3,000.00, and the Trial Court sustained that award in not granting Plaintiff's motion for a new trial.

In the case of New Orleans and Northeastern Railroad Company v. Hewett Oil Company Inc., 341 F.2d 406 (5th Cir. 1965), where the undisputed evidence established damages of $73,000.00 and the jury returned a general verdict for approximately one half of that amount, the Court held as follows, at page 410:

> The next point for consideration is the contention of the Plaintiff that the Trial Court erred in denying the motion of Plaintiff for a new trial solely on the issue of damages, since the jury's verdict was inadequate as a matter of law. It is the opinion of this Court that this motion should have been granted for the reason that the present verdict is not supported by the uncontradicted evidence, and is so inordinate in amount as to be contrary to right reason, and the evidence furnishes no sound basis for the verdict. (Cases cited)
>
> Although the granting or refusing of a new trial is recognized as resting within the sound discretion of the Trial Court, such discretion should be exercised with due regard for what is right and in the interest of justice. Inasmuch as the jury found Hewett liable, and the evidence uncontradicted as to the damages suffered by the Plaintiff, it follows logically that the award would necessarily have to be the amount of such undisputed damages.

In Cities Service Oil Company v. Launey, 403 F.2d 537 (5th Cir. 1968) the Court held that to find an abuse of discretion by the Trial Court, the jury's verdict must be against the "great weight" of the evidence, and that the Trial Court must sustain such verdict. Plaintiff contends that this is precisely what has occurred in the case at bar.

4. THE APPELLANT IS ENTITLED TO A NEW TRIAL ON THE ISSUE OF DAMAGES ONLY

The jury rendered special verdicts on the question of 1) liability and 2) the amount of damages. Therefore, the issues to be retried at the new trial are sufficiently independent and separate so that no uncertainty or injustice would result in a separate and new trial limited to the issue of Plaintiff's damages.

The Supreme Court, in Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494, 51 S.Ct. 513, 75 L.ed. 1188 (1930), held, at p. 1191:

> Where the practice permits a partial new trial it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . .Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot

> be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. . . .There should be a new trial on all of the issues raised by the counter claim.

The Gasoline Products Case has been cited widely in recent decisions for the proposition that a partial trial on the issue of damages can be granted, provided that the issues to be retried are separate and distinct from the issues settled at the first trial.

For example, in Parrish v. United States, 123 App. D.C. 149, 357 F.2d 828 (D.C. Cir. 1966), the Appellate Court, in reviewing a District Court decision rendered without a jury, said, at p. 820:

> The case is remanded to the District Court for re-examination of its findings in light of this opinion and for a finding whether appellant's alleged psychiactric disorders are the proximate result of the physical injuries sustained by her in the manner already found by the Court. If an affirmative finding is made, the issue of damages is also to be re-examined.

In the case of Washington Gas Light Company v. Connolly, 94 App. D.C. 156, 214 F.2d 254 (D.C. Cir. 1954), the Court of Appeals, in reviewing a jury award of damages, said, at p. 256:

> We come now to the damage. The part of the judgment awarding $6,000.00 to the insurance

> company will be affirmed. . .Evidence is altogether sufficient to support recovery for this amount for damage to the building.
>
> We set aside, however, the award of $12,000.00 to appellee, Connolly, and remand the question of amount, though not that of liability, for a new trial. It is well settled that we may thus divide the issues and limit the scope of a new trial. (Cases cited)

On the aforementioned principles and in the interest of justice and fairness, the Plaintiff prays this Court a new trial to determine the damages to be awarded to the Plaintiff from the Defendant Washburn.

B. THE VERDICT RENDERED BY THE JURY WAS A COMPROMISE VERDICT AND THE TRIAL COURT ERRED IN NOT OVER-TURNING IT.

For argument B, the Court should read the same material as in connection with Argument A.

As a separate and distinct basis of appeal, the Plaintiff contends that the Record compells the conclusion that the jury compromised in reaching its verdict, and therefore, the verdict should not have been allowed to stand.

This is a case where the jury declared the Defendant liable, and in the face of proven damages in excess of $34,600.00, rendered a monetary judgment in the amount of

$3,000.00. The strong inference exists that the jury was divided on the questions of liability and the amount of damages, and therefore, compromised by finding liability but limiting recovery to a nominal sum. It thus rendered both verdicts meaningless and useless!

In Bass v. Dehner, 21 F.Supp. 567(D.N. Mex. 1937); aff'd., 103 F.2d 28 (10th Cir. 1939); Cert. denied, 308 U.S. 580 (1939), the Plaintiff suffered personal injuries when the car in which he was riding was struck by an automobile operated by the Defendant. Two issues were presented upon the trial for negligence and submitted to the jury. They were liability of the Defendant, and damages. As to the first issue, the jury was charged that they could not return a verdict with the Plaintiff unless they found that the Defendant had carelessly and negligently driven across the center of the road, and that such negligence was the proximate cause of the injury. In addition, the issue of contributory negligence was submitted, and on the question of liability the jury found for the Plaintiff.

On the second issue of damages the evidence showed that the Plaintiff had a life expectancy of thirteen years; that for several years preceeding the accident, his earning capacity had ranged from $1,800.00 to $4,500.00 per annum; that the damage to the automobile was $350.00. On

that evidence the jury granted an award of $500.00.

The District Court reacted to the jury's finding by holding that the verdict found no support in the evidence and was so grossly inadequate that it could not be upheld. The Court, in weighing such factors as the time of day and week at which the jury retired, the great disparity between the award given and the evidence, held, at p. 568, 21 F. Supp.:

> The conclusion is inescapable that some of the jurors surrendered their convictions upon the issue of negligence while others surrendered theirs upon the issue of reasonably adequate damages in order to reach a verdict, and that verdict did not represent the conscientious conviction of the entire jury upon either issue. It is well settled that such a verdict cannot be divided into good and bad. ~~It cannot be sanctioned in respect to the issue of negligence and set aside as to that of damages with the new trial limited to the latter question.~~ To do so would be a serious injustice to the Defendant.

In Maher v. Isthmian Steamship Company, 253 F.2d 414 (2d Cir. 1958) the Court held at p. 416:

> What is the rule in the Federal Courts on the subject of allegedly compromise verdicts. . .?
>
> The rules formulated by most courts on the subject are easily stated, but the application of these rules to particular cases is sometimes difficult. Thus, "compromise" verdicts in which jurors reach agreement by means other than a conscientious examination of the evidence. . . are invalid.

In Schuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932); Cert. denied, 287 U.S. 622 (1932), the Plaintiff sued to recover damages for the loss of the sight of one eye. In reviewing the jury's award of $625.00 for such loss, the Appellate Court, said, at 58 F.2d, p. 34:

> We are satisfied that in the pending case the action of the District Court in granting a new trial generally was the only way in which justice could have been done. It is obvious as the Plaintiff contends and the District judge held, that the sum of $625.00 for the loss of an eye was grossly unjust and inadequate. It must have been so regarded by the very jurors who rendered the verdict, and it can give rise only to the inference that it did not represent a fair estimate of the Plaintiff's loss, but merely a difference of opinion among the jurors as to the Defendant's liability and a compromise of the controversy at the expense of both litigants. Such a finding ought not to stand. It ought to be set aside not only as to damages, but as to liability, for it speaks with no greater authority on the one subject than on the other.

For other cases holding, generally, that disparity between the amount of damages proved and the amoung awarded by the jury raises an inference that the verdict was arrived at through compromise, see, Malmskold v. Libby, McNeal & Libby, 31 F.Supp. 958 (W.D. Wash. 1949); Pugh v. Bluff City Excursion Company, 177 Fed. 399 (6th Cir. 1910); Davison v. Monessen Southwestern Railway Company, 144 F.Supp. 599 (W.D. Pa. 1956).

In light of the cited authorities, it must be inferred that members of the jury panel were divided on the issues of liability and damages, and that the award of record represents a difference of their opinions, and not an estimate of the Plaintiff's losses.

The Plaintiff further submits that the jury's tendency to compromise in its verdict is heightened by the Trial Court's presentation of more than one question to decide. In the instant case, the jury was asked to decide 1) liability of Washburn, 2) liability of Keener, and 3) the amount of damages. Therefore, the chance of division and difference of opinion amoung the jurors was more than doubled than if they had been asked only to render a general verdict. Therefore, the Plaintiff alternatively prays this Court to overturn the invalid compromise verdict, and to grant the Plaintiff a new trial on all the issues.

C.

THE TRIAL RECORD SHOWS THAT THE TRIAL COURT WAS PREJUDICED AGAINST THE PLAINTIFF TO SUCH A DEGREE THAT THE PLAINTIFF WAS DENIED A JUST AND FAIR TRIAL.

For argument C, the Court should read the following Record pages: 152, 164, 196, 311, 312, and 341 through 359.

A large part of the tragedy and injustice in the Plaintiff's case to date is due to the subtle prejudice of the Trial Court as evidenced by its comments during the trial, and the effect of such prejudice upon the jury. The jury, because of the Court's analysis of the evidence, was never led to view the evidence through the lens of the proper legal principles.

At Page 164 of the Record, the Court's questioning of one of the doctor witnesses suggested to the jury that

the Plaintiff was faking her injuries. Thus, at Page 164 the Court said:

> THE COURT: "But, doctor, I want to get away from science, I am a plain, blunt man and I like simple explanations.
>
> Do all these terms we have been discussing like traumatic neurosis and conversion hysteria and so on mean the Plaintiff imagines that he or she has pains that do not exist:
>
> WITNESS: That is right, Sir.
>
> THE COURT: Very well.

Moreover, in summarizing the facts for the jury, the Trial Judge led the jury to believe that the Plaintiff's pains do not exist, which simply is not supported by the Record.

Specifically, Judge Holtzoff stated, at P. 352, 353 of the Record:

> "She, (the Plaintiff) claims that her neck and shoulder pain continued and that these pains were the result of the accident.
>
> On the other hand, the Defendants' contend that the continuation of these pains after her first hospitalization was imaginary, that these pains are imaginary and do not exist. In medical language, the testimony is that she was suffering from a converse hysteria or traumatic neurosis. This was the diagnosis given by her own doctor, who testified that she exaggerated her pains, and that she imagines that she has pains that do not exist." (Plaintiff's emphasis).

Contrary to the trial judge's characterization that the Plaintiff's pain and suffering was imaginary and therefore non-existent, Doctor Holtzman testified at P. 167 of the Record:

> Q (By Plaintiff's Counsel). Doctor, the pain which you stated in response to his Honor's question as being imaginary pain of the patient, is this pain, even if imaginary, something that she really feels? Is it pain to her?
>
> A Yes, it is pain to her. Let's say that she may not interpret it as pain but she will interpret it as suffering, the equivalent of pain, some type of suffering."

Thus, Plaintiff's suffering, whether it be imaginary or not, is produced by traumatic neurosis. Such suffering causes pain, absence from work, and resort to extensive medical help. It is compensable at law, and should have been compensable to the instant Plaintiff.

Another example of a Trial Court's misunderstanding of the medical testimony appears at Record 151-153, where the Court coerced the medical expert, Doctor Holtzman, to reverse himself regarding the definition of a placebo:

> Q (By Defendant's Counsel) Alright, now Doctor, what is a placebo?
>
> A A placebo is a medication that is given for relief or for treatment that has no known therapeutic effect but is used as a substitute for medication that does, in the attempt to prove that the psychological or mental or emotional factors of the patient will improve with placebo, a pill or medication that has no therapeutic effect.
>
> THE COURT: You mean it is something to arouse the imagination of the patient, that the patient thinks he is getting medicine?
>
> THE WITNESS: No, it is actually physically given but it has no therapeutic value. It could be water in an injection. Now, when the psyche is disturbed, the patient getting medication will feel relief, as if the patient were given a known pain relieving type of medication of injection.
>
> In other words, when the effect is successful in relief of the symptom, it implies a psychological cause or a neurotic cause for the symptoms.

///

THE COURT: In other words, it appeals to the Plaintiff's imagination, isn't that it?

THE WITNESS: Well, it soothes the patient's disturbed psyche, let's put it that way. It might not be the imagination.

In other words, if you have pain and you take a narcotic in relief of pain, if the pain is on the basis of a neurosis or, as you say, imaginary or a figment and you get relief with water, then you know it is an emotional pain.

THE COURT: You mean the pain doesn't actually exist?

THE WITNESS: That is right.

THE COURT: That the patient only imagines he has it?

THE WITNESS: That is right.

The above testimony demonstrates clearly the Trial Court's insistence on characterizing pain and suffering as either real and recoverable, or, imaginary and unrecoverable. The Court's characterization of the Plaintiff's pain and suffering in open Court before the jury continually clouded the jury's understanding of the significance of the medical testimony.

The wrongful and prejudicial influence thus exerted upon the jury by the Court resulted in the denial to the Plaintiff a just and fair trial.

Throughout the trial the true issues were continually obscured by the Trial Court's misunderstanding of what constituted a proper basis of relief. As evidenced by the Court's

jury instructions at Pages 351-353 of the Record, the Court apparently believed that Miss Bourne could recover only for damages resulting from pain and suffering from physical injuries directly and causally connected with the collision.

The record is completely devoid of any mention of a possible recovery on the basis of the Defendant's act having aggravated or activated a neurosis theretofore dormant in the victim, which in turn, caused grievious secondary damage, loss, pain and suffering.

The law regarding the proper jury instruction on the question of secondary psychological disabilities is:

> "...A Plaintiff may not recover damages for ailments arising merely from emotional or psychological or so-called nervous shock; however, if a Plaintiff suffers substantial physical injuries which approximately cause secondary physical effects or nervous or emotional or psychological disabilities, she may recover damages for such secondary physical effects or nervous or emotional or psychological disabilities as stem from the original physical injury in an unbroken chain of causation."... Hamilan Corporation v. O'Neill, 106 App. D. C. 354, 273 F.2d 89, 90 (D. C. Cir. 1959).

Similarly, in Perry v. Capital Transit Company, 59 App. D. C. 42, 32 F.2d 938 (D. C. Cir. 1929), the Court charged:

> "...If you should find that Mrs. Winston suffered substantial physical injury from the glass in the drinks served her by the Hamilton Hotel, and you should further find that Plaintiff has proved by a preponderance of the evidence that as a direct result of such physical injuries, she

> suffered increased nervousness, ill effect on her throat and voice, recurring abdominal and stomach pain, or any other conditions she complained of; or that the nervousness caused by such substantial injury in turn resulted in other complaints, such as the ill effect on her throat and voice or pains and impairment of the complexion or aggravation of a pre-existing acne, then you may allow damages for any or all of such conditions as you find the result directly or indirectly an unbroken chain of causation from the original substantial physical injury done by the glass."

At no juncture did the Trial Judge instruct or attempt to instruct the jury on the issue of the Plaintiff's right of recovery for secondary damages resulting from psychological disabilities. This was clear error!

In light of the foregoing points and authorities, the Plaintiff submits that the Trial Court performed in such a prejudicial manner that the Plaintiff was denied due process of law and a just result. Therefore, the Plaintiff prays this Court to remand this case for a new trial on the issue of damages.

V

CONCLUSION

The Plaintiff has established three separate and distinct errors of law which require remanding the instant case for a new trial, namely,

(1) The jury award was inadequate as a matter of law and the Trial Court erred and abused its

discretion in not granting the Plaintiff's motion for a new trial.

(2) The verdict rendered by the jury was a comprise verdict and the Trial Court erred in not overturning it.

(3) The trial record shows that the Trial Court was prejudiced against the Plaintiff, and, as a result, the Plaintiff was denied a just result.

The Plaintiff urges this Honorable Court to consider the Points of Appeal separately and severally and on the basis thereof, prays that the following relief be granted.

(1) That on the strength of the record, the Plaintiff's award be increased to the amount of $34,730 with a remand to the District Court to determine the Plaintiff's damages for pain of suffering and anticipated medical expenses, as well as loss of future earnings; or alternatively,

(2) That the Case be remanded for a new trial on the issue of damages only; or alternatively,

(3) That the case be remanded for a new trial on all issues; or alternatively,

(4) For such other and further relief as to the Court seems just and proper.

Respectfully submitted,

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Appellant,

v.

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Appellees.

Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEE, FAWAN WASHBURN

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE, FAWAN WASHBURN

I.

STATEMENT OF ISSUES PRESENTED

The statement of issues presented by appellant properly recites those issues which appellant desires to present.

II.

REFERENCES TO RULINGS

It is noted that appellant complains of no specific rulings of the Court below.

III

COUNTER STATEMENT OF THE CASE

Appellant's statement of the case is incorrect and inadequate in the following particulars:

Trial commenced November 14, 1967, not November 17, 1967 as stated by appellant at page 4 of her brief.

Appellant's appeal was from the entire judgment entered herein and she cannot, as she attempts to do at page 6 of her brief, limit her appeal to that of damages to the exclusion of liability.

Appellant's statement of the medical testimony omits defendant's testimony which bears upon the disputed question at trial whether the treatment and procedures undertaken were causally connected to the accident of November 2, 1959.

Medical testimony offered at trial by this appellee may be briefly summarized as follows:

Dr. Robert H. Groh, a neurologist and psychiatrist, examined appellant in June, 1960, at the request of her physician, Dr. Saul Holtzman (R.249). He took a history, made a complete neurological examination, and reported to her doctor that he could find "no evidence of organic neurological disease and from her appearance and her statements I felt it was a rather strong emotional overlay in this problem she was having." (R. 253) He did not discuss the origin of the emotional problem. (R.253)

Dr. William T. Spence saw appellant in October, 1961, at the request of Dr. Holtzman and as a result he recommended that appellant receive psychiatric evaluation and treatment. (R.273)

Dr. Alfred J. Leussenhop of Georgetown University examined appellant during her admission to Georgetown University Hospital in November, 1961 (R.273), and among other things he noted a discrepancy between the appellant's

motions and actions under examination and when not being examined. (R.277-278) Dr. Leussenhop advised appellant to seek psychiatric consultation to assist in evaluating her symptoms of pain but she refused to follow through with this recommendation. (R.279)

Dr. Joseph T. Kaye executed the discharge summary concerning appellant's stay at the National Orthopedic Hospital in 1962 (R.280), and which indicated that no physical or neurologic origin for her complaints could be found (R. 282), that when distracted she freely used her left arm. (R.284)

Dr. James L. Foy saw appellant in November, 1962 (R. 285), and reported, among other things, that there was "a gradual decompensation of the patient in the direction of a psychotic paranoid state." (R.286) Appellant was under the delusion that Dr. Foy was "in league" with appellee Washburn. (R.285)

Dr. William J. Novak, a psychiatrist, who attended appellant at D.C. General Hospital in 1962 (R.292-293), testified concerning the administration of appellant of a series of placebos (sterile water hypodermic injections) and their effect upon her. (R.296-301). This testimony was summarized as follows:

> "Q. Doctor, just to summarize this point with respect to the use of the placebo: The patient imagines that she has a pain, the placebo is administered, the pain goes away. This is the effect, is it not?
>
> "A. Yes, yes." (R.301)

Dr. Harold Stevens, a neurologist, at the request of the Court below had examined appellant in connection with a previous stage of this litigation (R.326) and, therefore, was called as the Court's impartial witness. (R.327) His testimony contained a full review of appellant's medical history. (R.328-331) The history contained the essentially negative physical and neurological findings, and the inconsistent responses and non-anatomical responses. (R.329-330) His

neurological examination resulted in several inconsistent responses. (R.331-334) His examination and review of history led him to conclude appellant was

> "free of any organic disease of the central or peripheral nervous system. There is no evidence of any brain damage. If she suffered a cerebral concussion, it was a minor one and produced no sequelae. That is no consequence." (R.335-336)

Dr. Stevens concluded

> "It is further my opinion that she has a conspicuous conscious element present in her psychological complaints, and it was my opinion that this pattern of injury was not likely to produce a traumatic neurosis. There is no evidence now nor in the record that she suffers or suffered from any psychosis." (R.336)

In appellant's summary of the testimony of Dr. Saul Holtzman, her own physician, there are significant omissions. He gave it as his opinion that appellant was not "malingering." (R.129) In his testimony he stated that although he had seen her nine times before the automobile accident (R.135-139) he had not noted "that she had any emotional instability other than the ordinary or average." (R. 133) Appellant did not tell her doctor that she had been discharged from her job the day of the accident, but this would be an upsetting thing to her. (R.134) He prescribed a series of placebos in 1961 for appellant. (R.151-159) He stated that a patient with traumatic neurosis "imagines he or she has pains that do not exist." (R.164) Dr. Holtzman never was asked nor did he testify that the traumatic neurosis he diagnosed in appellant was the result of the accident of November 2, 1959. He did say it "followed" the physical injury (R.128) but this is not the same thing.

While appellant mentions the "glove-type sensory loss" in her left arm found by Dr. Hugo Rizzoli at page 11 of her brief, she does not mention that Dr. Rizzoli admitted

on cross-examination that it was an "abnormal finding" and that it was "not physically neurologically possible that she [appellant] would lose the sensation in a glove-type characteristic." (R.203)

Appellant's statement omits any reference to the fact that she had been discharged from her employment at United Fruit Company on the day of the accident. (R.226) Her physician, Dr. Holtzman, stated that this would be upsetting to her (R. 134), and this appellee testified appellant was quite upset that evening before the accident and was "weeping." (R.27)

The jury had the opportunity to observe appellant use her left hand in a fashion which was inconsistent with her testimony respecting her abilities. (R.242)

Appellant's summary on page 11 of her brief is not factual but conclusive. While it is admitted that appellant has had extensive medical attention there was a factual issue properly presented to the jury whether that medical attention (1) was necessary and (2) was causally connected with the accident.

There is no doubt that appellant suffered minor injuries in the automobile accident in question. The extent of the injuries causally connected to the accident was a jury question on controverted evidence. It is not "clear" as appellant states at page 11 of her brief that the accident "precipitated an emotional overlay or conversion reaction, conversion hysteria or traumatic neurosis." There was a sharp dispute on this point as well as whether the appellant suffered or suffers "continuing and aggravated pain."

While there were proven medical and hospital charges in the amount of $14,717.50[1] the extent to which these expenses were (1) reasonably incurred and (2) causally con-

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[1]The figure of $12,589.72 used by appellant for these charges overlooks the bill of Dr. Holtzman of $1,522.00 (R. 130) and that of Dr. Rizzoli of $250.00 (R. 194).

nected with the accident in issue were properly jury questions.

IV

ARGUMENT

A. THE JURY AWARD WAS NOT INADEQUATE AS A MATTER OF LAW.

The jury award to appellant was not inadequate as a matter of law and the trial court did not, therefore, abuse its discretion in refusing to grant a new trial. The record in the trial court shows a typical vehicular intersection collision. The issue of the liability of both defendants below was hotly contested and the issue of the plaintiff's injuries was even more contested. The defendants challenged not only the extent of appellant's injuries but the necessity for the treatment and hospitalization and the extent to which such medical attention as was received and the alleged loss of earnings was causally connected with the accident in issue.

Appellant was ably represented at the trial by two attorneys. The trial counsel is and was recognized in this area as having exceptional expertise on the subject of tort liability. He is well known as an outstanding attorney, generally representing plaintiffs. Her other counsel has long represented her and was thoroughly familiar with her entire medical background and history. He was present throughout the trial and was thus able to consult and advise with respect to all aspects of trial, including trial strategy.

The plaintiff called two doctors as medical witnesses, Dr. Saul Holtzman and Dr. Hugo V. Rizzoli. The defendant called two physicians as witnesses, Dr. Robert H. Groh and Dr. William J. Novak. In addition, the defendant presented through stipulation the testimony of four physicians, Dr. William T. Spence, Dr. Alfred J. Leussenhop, Dr. Joseph T. Kaye and Dr. James L. Foy. The essentials of their testimony has been summarized heretofore.

In addition, the court, and the jury had the testimony in person of Dr. Harold Stevens, who testified as a witness

called by the court. Dr. Stevens examined the plaintiff prior to the trial for an unrelated purpose at the request of another judge of the court below and his report was previously furnished to the Court. The essence of his testimony has been heretofore related.

The great burden assumed by a disappointed suitor when complaint is made that the jury award is inadequate is well described by this Court in the case of *Bryant v. Mathis* (107 U.S. App. D.C. 339) 278 F.2d 19 (1960). In that case, appellant was a passenger in a motor vehicle and received a jury verdict against both drivers in the amount of $4,250. Her appeal was directed solely to the alleged error in the trial court's denial of her motion for a new trial based upon alleged inadequacy as a matter of law of the jury award. The medical expenses totaled $3,407.32 and appellant testified that she was away from work approximately 4½ months and earned roughly $12,000 a year. Her testimony in this respect was uncontradicted. Both liability and the amount of damages were contested.

In the *Bryant* case this Court said:

> "Courts are understandably reluctant to overturn jury verdicts on the grounds that they are inadequate or excessive. Fairmount Glass Works v. Cub Fork Coal Co., 1933, 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439; Frasca v. Howell, 1950, 87 U.S. App. D.C. 52 182 F.2d 703. This is especially true of appellate courts, for motions for new trial are committed to the trial court's discretion. Ibid. Cf. Miller v. Maryland Casualty Co., 2 Cir., 1930, 40 F.2d 463, 465. Although the jury's verdict in this case creates some 'wonderment,' Rankin v. Shayne Brothers, Inc., 1956, 98 U.S. App. D.C. 214, 215, 234 F.2d 35, 36, we cannot say that it was so arbitrary that it must be reversed as a matter of law."

The *Bryant* case was expressly decided on the authority of *Rankin v. Shayne Bros. Inc.* (98 U.S.App.D.C. 214) 234 F.2d 35 (1956). The *Rankin* case, like the *Bryant* case, was the result of an automobile collision and the appellant was a passenger in one of the vehicles. Insofar as here per-

tinent, the sole issue before the Court was a charge of error in refusing to grant a new trial based upon the complaint of an inadequate jury award. The jury found the defendant liable for the death of a nine-week old boy but returned a verdict in favor of the administrator in the amount of $123.93, the exact amount of the out-of-pocket expenses. This Court held that the trial court (then District Judge Tamm) had properly instructed the jury with respect to the allowable measure of damages, noting further that no other or different instructions were instituted by the plaintiff and that no objection was made by the plaintiff to the instruction given. The pertinency of the Court's observation and its unquestioned correct expression of the law is such as to justify lengthy quotation from this Court's holding on the matter as follows:

> "In these circumstances, and notwithstanding there was evidence to support substantial damages, we are impelled to hold that the District Court did not abuse its discretion in refusing to grant a new trial on the ground of inadequacy of the award. Though properly instructed the jury appears to have been unable to find with sufficient certainty that substantial damages measurable in money grew out of the death of the infant. The District Court was not required upon the evidence adduced to insist upon a different result. This court, like courts generally, has been reluctant to set aside jury awards for personal injuries on the ground of either excessiveness or inadequacy, assuming constitutional power to do so. Coca Cola Bottling Works v. Hunter, 95 U.S. App. D.C. 83, 219 F.2d 765; National Homeopathic Hospital v. Hord, supra; Frasca v. Howell, 87 U.S. App. D.C. 52, 182 F.2d 703; Dean v. Century Motors, 81 U.S. App. D.C. 9, 154 F.2d 201; Ramsey v. Ross, 66 App. D.C. 186, 85 F.2d 685; cf. Hulett v. Brinson, D.C. Cir., 229 F.2d 22. And in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481, 53 S.Ct. 252, 254, 77 L.Ed. 439, it is said:

> '* * * The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.'
>
> We refer also to Dunn v. United States, 284 U.S. 390, 394, 52 S.Ct. 189, 191, 76 L.Ed. 356, where it is said that though the verdict, as in the case at bar, possibly may have been the result of compromise, or of a mistake on the part of the jury, 'verdicts cannot be upset by speculation or inquiry into such matters.' Compare, however, such cases as Wallace v. City of Rock Island, 323 Ill. App. 639, 56 N.E. 2d 636." (Footnotes omitted)

The trial below in the case at bar adequately and completely instructed the jury respecting the proper measure of damages. As in *Rankin*, appellant's counsel below did not request any other or different instruction on this subject, nor was any exception taken to the instruction by appellant's counsel below. Indeed, appellant's counsel here does not challenge the propriety of the instruction. Appelplant's complaint here is that she believes the jury was less than generous in their appraisal of the consequences to appellant of the automobile accident in question.

Certainly it cannot be held under the circumstances of this case that the District Court abused its discretion in refusing to grant a new trial on the ground of the inadequacy of the award. Certainly, as in *Rankin*, it could be inferred that the jury appeared to have been unable to find with sufficient certainty that all of the special damages alleged by the appellant were causally connected to the accident complained of. This was the exclusive province of the jury and it is submitted that the jury properly discharged its

fact finding function. Certainly it cannot be held as a matter of law that appellant is entitled to more than $3,000.

Appellant's brief attempts to make the point that there is no basis in the record for the jury award of damages in the amount of $3,000 (p. 12 et seq). This is an amazing argument and on its face is not sound. Apparently what appellant asserts is that the appellant's claims for injuries and damage were so far in excess of $3,000 that the jury award was inadequate as a matter of law. This is based upon the completely unfounded conclusion of appellant that she had a "pre-existing psychic weakness". As appellant's counsel states, this is the "touchstone of the Plaintiff's appeal." (p. 13)

Appellant's counsel argues that a wrongdoer takes the victim as he finds him. This principle of law is not disputed by appellee. Appellee, however, does dispute that there was properly before the trial court any issue with respect to a "pre-existing psychic weakness." The short answer to this contention is that appellant did not try her case on this theory. She did not request any instructions on the point. The issues tried by counsel before the jury and the issues formulated to the jury by the Court at the request of counsel permitted the jury a wide range, both as to liability and as to damages. The jury could have found both defendant drivers liable. It could have found defendant Keener solely liable. It could have found neither defendant liable. Or it could have, as it did, hold appellee Washburn solely liable.

Insofar as the item of damages is concerned, the jury could have found damages in excess of the actual special damages to which appellant and her witnesses testified. If the jury had believed the appellant and her witnesses it could have believed that medical and hospital bills attributable to the accident totaled $14,717.50 and that the total wages lost up to the time of trial were $22,140. Under these circumstances, how large a verdict would have to have been rendered for this Court to have seriously considered

awarding a new trial to appellee upon appellee's application to set the award aside on the ground of excessiveness?

There is a logical basis in the jury award. The jury might properly have concluded that the hospital bill for the first hospitalization of $445.50 (P. Exh. 1) and the first few visits to Dr. Holtzman were properly attributable to the injuries actually sustained. Appellant was unemployed at the time of the accident. Under these circumstances the jury award of $3,000 could be regarded as generous.

Appellant's credibility was directly in issue throughout the trial and it is submitted was so sufficiently impeached that the jury could properly take this into account in arriving at the assessment of the plaintiff's statement of subjective complaints which relates, of course, to the necessity for the treatment incurred and the alleged loss of earnings. Appellant testified that she was not upset because she was discharged from her job a few hours before the accident (R.227) and that she did not cry because of this during the evening spent with this appellee (R.228). Appellee Washburn testified that appellant was upset as a result of her discharge from employment and that she did weep during the course of the evening. (R.27) Appellant testified flatly that no doctor had ever suggested psychotherapy or psychiatric treatment (R.236) and specifically that Dr. Holtzman did not suggest she see a psychiatrist (R.234) and that Dr. Leussenhop did not make the same suggestion (R.237). Dr. Holtzman, appellant's family physician, testified that he suggested psychiatric treatment several times. (R.139-140) Dr. Leussenhop also suggested to the appellant that she have psychiatric treatment. (R.279) Appellant testified that she never received occupational therapy at the National Orthopedic Hospital and that she was never asked to use a typewriter at that institution as a part of this therapy. (R. 239) The records at the hospital show that she did receive occupational therapy (R.283) and that as a part of this she was requested to use the typewriter but refused to do so. (R.184) Appellant testified that Dr. Holtzman would not continue her treatment unless she paid her bill. (R.241)

Dr. Holtzman flatly denied this and stated he discontinued treatment because appellant would not take his advice to see a psychotherapist. (R.148) These instances clearly demonstrate the factual nature of the issues which the jury was here properly required to evaluate.

Litigation is a formidable undertaking. Any party setting foot upon that path cannot know with mathematical certainty all of the attendant difficulties and uncertainties. Under such circumstances competent counsel may minimize risk and dispel some of the uncertainties. In this case appellant chose to take her chances, against the advice of competent counsel, and should not now be allowed to renounce the consequence properly thrust upon her by a jury who apparently did not give full credence to her testimony.

Appellant's counsel cites cases to prove that one suffering from pre-existing psychic disorders may recover for aggravation of such disorders resulting from a negligent act. This is, of course, not disputed. The fact, however, is that there is no evidence here to show any pre-existing psychic disorder. At best, a factual issue was presented whether any psychic disorder existed after the accident and, if so, whether it was the result of the accident in question.

At page 17 of appellant's brief there is reference to "uncontradicted evidence" respecting what counsel describes as plaintiff's claim for " 'compensated' neurosis" and "traumatic neurosis." Appellant's counsel did not request the jury to consider that she had " 'compensated' neurosis" or "traumatic neurosis." This appellee's medical testimony, if believed, as it apparently was, showed that the plaintiff's medical expenses were almost entirely the result of her own exaggeration and imagination and that her claimed loss of earnings was not in any substantial degree caused by the injuries which she suffered in the automobile accident. Dr. Stevens gave his opinion that there was a "conspicuous conscious element present in her psychological complaints" and that this pattern of injury "was not likely to produce a traumatic neurosis." (R.336) No prayer for relief on the

ground of aggravation of a pre-existing psychic condition was requested and appellant, therefore, cannot now complain that a theory of recovery which was not presented to the jury by the evidence or by a proper instruction was apparently not weighted in the verdict.

At page 17 of her brief appellant speaks of the "uncontradicted evidence" showing the extent of plaintiff's injuries, and at page 30 of appellant's brief she, perhaps abashed at the flatness of the prior statement, more modestly refers to "the overwhelming weight of evidence" in the plaintiff's favor. Certainly all recognize that the weight of evidence is peculiarly for the jury and no court is at liberty to substitute its own feeling as to the weight of evidence for that of the jury.

At page 30 of appellant's brief she concludes that the law in the District of Columbia allows recovery from the wrongdoer for secondary damages arising from aggravation of a pre-existing neurotic weakness. Appellee does not deny that such is the law in applicable cases. Appellee asserts, however, that this is not an applicable case.

While appellee recognizes the usual rule with respect to appellate action in reviewing grounds for refusals for a new trial referred to at page 33 of appellant's brief and set out in *Somerville v. Capital Transit Company* (89 App.D.C. 343) 192 F.2d 413 (1952), her case is solely based upon her erroneous conclusion that "the uncontradicted evidence" shows that there was money damage of "at least $34,600." (p. 34) As heretofore noted, the causal connection between the money damage claimed and the accident was fully contested below and the resolution of such a contest was peculiarly the province of the jury.

Appellant's counsel, perhaps unconsciously, barred the defect in her position on this point in the following sentence in the brief: "The uncontradicted evidence demonstrates that Plaintiff's money damage *allegedly* arising from the Defendant's acts was at least $34,000.00." (pp. 33-34; emphasis supplied) The use of the word "allegedly" was well advised. Appellant's claim is that the special damages

amounted to that sum, and it was appellee's claim that nearly all of such damages were not causally connected to the injuries appellant claims resulted from the accident.

While denying at all times that appellant is entitled to a new trial, appellee asserts that a new trial, if granted, should not be limited to the item of damages as requested by appellant. (p. 35 et seq.)

The facts surrounding the intersection collision are inextricably woven into the facts of damage. The speed of the vehicles prior to collision, the application of brakes, the force of the impact, the movement and the location of the cars after impact, and other matters relating to liability are appropriate for the consideration of the jury in order to determine whether the consequences appellant claimed resulted from the injury were within the realm of reasonable probabilities. In addition, appellant has seen fit to abandon her appeal against the co-defendant below and in any retrial this appellee should have the opportunity of showing to the jury the original co-defendant's relationship and connection with the accident. A partial remand would be an injustice to this appellee.

B. THE JURY AWARD WAS NOT A "COMPROMISE" VERDICT.

Appellant contends that the jury's verdict was a "compromise" and therefore should not be allowed to stand. (p. 37, et seq) This argument is not sound.

At the outset, the inconsistency of appellant's position should be noted. Appellant urges that the verdict with respect to liability against this appellee should stand as being proper but then argues

> "The strong inference exists that the jury was divided on the questions of liability and the amount of damages, and therefore, compromised by finding liability but limiting recovery to a nominal sum. It thus rendered both verdicts meaningless and useless." (p.38)

If the verdict on liability is "meaningless and unless" then how can appellant, in good conscience, urge that it stand?

Appellant misconceives the judicial holdings relating to so-called "compromise" verdicts. The "compromise" verdicts which are defective are those where it can be shown or where it is obvious that the jury has arrived at its decision in a grossly improper way. The improper "compromise" verdict was described by Judge Medina in the case cited by appellant, *Maher v. Isthmian Steam Ship Company*, 253 F.2d 414, 2d Cir. (1958) as follows:

> "The rules formulated by most courts on the subject are easily stated (see 53 Am Jur., Trial §§ 1028-1033), but the application of these rules to particular cases is sometimes difficult. Thus, 'compromise' verdicts in which jurors reach agreement by means other than a conscientious examination of the evidence and 'quotient' verdicts which involve agreement by the jurors to be bound by the quotient before it is determined, are invalid. 53 Am. Jur., Trial §§ 1033, 1030, 1031."

Compromise on the issue of damages is not improper. In fact, compromise may be regarded as the essence of jury deliberation. Certainly in cases of unliquidated damages and particularly in cases of controverted personal injury it can hardly be expected that 12 jurors would in the first instance agree on the precise sum ultimately awarded. Discussion respecting the amount of an award is normal. That jurors should harmonize their views, or, if you please, compromise among themselves as to the final award is in the nature of the system. Such action is not a vice but a virtue.

The other cases cited by appellant in this regard are not comparable to the case at bar and do not support appellant's position.

In the *Bass* case, cited by appellant at pages 38 and 39 of her brief (*Bass v. Dehner* 21 F. Supp. 567 (D. N.Mex. 1937), aff'd. 103 F.2d 28 (10th Cir. 1939) cert. denied 308 U.S. 580 (1939), there was no controversy but that

the death of Dr. Bass, the plaintiff's decedent, was causally related to the accident. The earning capacity of $1,800 to $4,500 per annum and the life expectancy of 13 years was likewise not controverted at trial. Property damage was $350. The trial court pointed out that the jury received the case Saturday afternoon and after deliberating about two hours returned a verdict of $500 for plaintiff in the "late afternoon on Saturday" and that "the week-end was at hand." (21 F.Supp. 568) It was in this context that the trial court granted a new trial on the ground that it was "so grossly inadequate that it cannot be upheld" and used the language quoted by appellant at page 39 of her brief.

No such conditions existed here. The question of damages both as to special damages and extent was sharply contested, not conceded. The jury deliberated at leisure on a Tuesday (November 21, 1967), commencing at 12:09 p.m. and returning the verdict at 3:15 p.m. (R.335, 357)

In *Schuevholz v. Roach*, 58 F.2d 32 (4th Cir. 1932), cert. denied, 287 U.S. 662 (1932) cited at pages 39 and 40 of appellant's brief, the only question was whether a second trial (the first verdict having been set aside on the grounds of gross inadequacy) should, as a matter of law, have been limited to damages. In the second trial the verdict was for defendant and plaintiff complained that liability should not have been submitted to the jury. The Circuit Court properly held that the entire case was for submission on the second trial. The case is against appellant's effort to bifurcate the trial.

In *Malmskold v. Libby, McNeil & Libby*, 31 F.Supp. 989 (W.D.Wash. 1949) cited at page 40 of appellant's brief, the trial court granted a new trial on liability as well as damages on plaintiff's plea of inadequacy of award upon his stated belief that

> "* * * some of the jurors thought defendant liable and some did not, that the pretended verdict was agreed to by all the jurors only after those who thought defendant liable agreed to a reduction of

> the amount of the award to its present inadequate amount in return for the consent in the finding of liability by those who did not actually believe defendant liable." (31 F.Supp. 960)

Even such a suggestion is not possible in the case at bar.

In *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399 (6th Cir. 1910) cited at page 40 of appellant's brief, the jury verdict of $1.00 in a wrongful death case was set aside. The Court held

> "The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement." (177 Fed. 401)

This case, thus is inapposite.

In *Davidson v. Monessen Southwestern Railway Co.*, 144 F.Supp. 599 (W.D.Pa. 1956) cited at page 40 of appellant's brief, the jury wrote words on a purported verdict which by implication excluded any allowance for pain and suffering. Under the circumstances the award was set aside by the trial court and a new trial ordered on *all issues*.

At page 41 of appellant's brief she urges the inference of an improper "compromise" because the trial judge submitted the issue of liability as to both defendants separately from the issue of damages. Appellant's claim cannot be serious on this point. Of course the issue of liability in the charge to the jury had to be separated from the issue of damages because there were two defendants. Certainly the Judge's submission to the jury of the amount of damages had to be done separately. No complaint was made at the trial level by appellant's counsel and appellant, therefore, cannot now assert that that which was done below with her consent was error.

C. THE TRIAL JUDGE WAS NOT PREJUDICED AGAINST APPELLANT.

Appellant's third argument relates to a claim that the trial judge exhibited prejudice. Appellant urges that the trial judge's actions toward her were such as to deny her a fair trial. (p.41, et seq) This is simply not so.

The questions of the trial judge cited by appellant in her brief are, in context, perfectly appropriate aids to ascertain truth. Thus, the passage on pages 41 and 42 of appellant's brief referred to page 164 of the record. A reading of this passage shows that it is a perfectly logical and appropriate summary of the testimony of appellant's doctor. The appellant's doctor here agreed with the Court that the plain meaning of the medical terms he had been using was that "plaintiff imagines that he or she has pains that do not exist." This completely eliminates the claim that the trial judge was evidencing prejudice. If this was the plain meaning of the doctor's testimony, how can appellant have been prejudiced by allowing such plain meaning to be brought out?

At the middle of page 42, appellant's counsel refers to a passage in the trial judge's charge to the jury as being prejudicial. The answers to this contention are plain: (1) appellant's counsel did not object to the charge in this respect and (2) the statement contained in the charge was an accurate description of the doctor's testimony. Appellant's counsel somehow equates the accurate summary of the testimony of appellant's doctor into prejudice. If there was prejudice it arose from the testimony of appellant's doctor and not from that of the trial court. In any event, no objection was made by appellant below.

At pages 43 and 44 of her brief she refers to a passage appearing in the transcript at pages 151-153. Appellant characterizes the Judge's questioning as an instance where "the Court coerced the medical expert" to reverse himself regarding the definition of a placebo. It is submitted that a fair reading of the passage is not susceptible to the appellant's conclusion that the medical witness either reversed himself or that he was coerced. The testimony of the appellant's medical witness in short was that if a placebo (a substance administered for relief or for treatment that has no known therapeutic effect, such as water) is administered and the patient gets relief from pain, then it is known

that the pain does not actually exist or the patient only imagines he has the pain. (R.152-153) It is difficult to conceive how the court's clarification of this point can be construed as prejudice. In addition, appellant does not contend that the medical witness' testimony is incorrect or that the witness was misled into an incorrect response.

Had there been any impropriety in the court's questioning of any witness, and such questioning was not limited to appellant's witnesses, then appellant's competent counsel below would have made prompt and vigorous objection. The absence of such objection is perhaps the conclusive rebuttal to appellant's contentions in this regard.

At the bottom of page 44 and continuing onto page 45, appellant criticizes the jury instructions and concludes that they were too confining. Careful reading of the instructions indicates that they were a full and fair presentation of the proper measure of damages and included all proper requests submitted by appellant. The charge included the following in respect to damage:

> "The third question for you to consider is:
>
> What amount of damages did the plaintiff sustain as a result of the accident?
>
> You will answer that question by specifying a sum of money in dollars, a single lump sum, which you find is the amount of damages that the plaintiff sustained and that should be awarded to her.
>
> The amount of damages to be awarded for personal injuries is a question solely and peculiarly within the sound judgment of the jury. She is entitled to recover damages only for the injuries that she actually sustained as a result of the accident and for nothing else. The burden of proof, as I said before, is on her to establish by a preponderance of evidence what injuries she sustained as a result of the accident, and that are to be attributed to the accident, and what damages flow from it.

You are not to consider any expenses or any pain or any other matters except those that were the result of the accident, and the burden of proof is on her to show what the results of the accident were.

While the law leaves the question of the amount of damages to the sound judgment and discretion of the jury, it does lay down certain principles to guide the jury in arriving at the amount, which I shall now summarize:

First, out-of-pocket expenses, such as medical and hospital services, and the like, that are attributable to the particular injuries caused by the accident; of course the loss of any income, if any, also as a result of the accident; and a suitable sum to compensate the person for the pain and suffering caused by the accident and not by anything else.

I do not mean that your verdict should particularize or itemize these various matters. The amount of damages that you award will be a single lump sum; but in arriving at a single lump sum, you should consider the matters to which I have just referred.

In this connection, of course, you are not bound by the testimony of the plaintiff. You should give it such weight as you deem wise and proper. The final determination of the figure is in your province.

As a result of the accident, the doctor's diagnosis is that the plaintiff sustained a strain of her neck muscle. She was removed from the scene of the accident to the Washington Hospital Center. She received treatment in the emergency room, was then released, and went home. A day or two later she went to her doctor, Dr. Holtzman, who had her taken back to the Washington Hospital Center because of her neck muscle strain and similar consequences.

She remained in the Washington Hospital Center slightly over two weeks, and her bill amounted to $455.50. She then went home.

> The testimony shows that for several years following she went to numerous doctors from time to time, she went to various hospitals from time to time.
>
> She claims that her neck and shoulder pain continued, and that these pains were the result of the accident.
>
> On the other hand, the defendants contend that the continuation of these pains after her first hospitalization was imaginary and do not exist. In medical language, the testimony is that she was suffering from a conversion hysteria or traumatic neurosis. This was the diagnosis given by her own doctor, who testified that she exaggerated her pains, and that she imagines that she has pains that do not exist.
>
> Other doctors gave similar opinions. Some used somewhat different terms. Some used the term 'anxiety neurosis,' and some used the term 'emotional overlay.'
>
> You have to weigh the testimony in arriving at what amount to award to the plaintiff for damages.
>
> Your award should be fair compensation; no less, of course, but no more than the amount that would fairly compensate her for the injuries that she actually sustained and that actually flowed from the accident, and for nothing else."

In any event, there was no objection to the charge and appellant may not now be heard to raise such issues. In particular, appellant may not now be heard to urge that she should be entitled to a new trial on the theory that this appellee's actions "aggravated or activated a neurosis theretofore dormant in the victim," (p.45) when such an issue was not properly tendered to the court either in appellant's pretrial statement, in the evidence at the trial, or to the court for instruction to the jury. Appellee doubts that even now appellant personally consents to the injection of such an issue before this Court. How can appellant's coun-

sel seriously urge a new trial based upon the failure of the Court to instruct on an issue which was not before the court on a new trial because appellant would not then consent that the issue be presented?

D. APPELLANT IS NOT ENTITLED TO RELIEF REQUESTED.

Appellant at page 47 of her brief requests this Court to increase the jury award to the amount of $34,730 and to remand the case to the District Court to determine appellant's damages for pain and suffering, anticipated medical expenses, as well as loss of future earnings. This is a novel request. Appellee knows of no authority, statutory or judicial, which would allow such a procedure. even if the items omitted were improperly omitted—which is denied.

V

CONCLUSION

It is submitted that the action of the trial court in overruling appellant's motion for new trial should be affirmed.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,676

RUBY C. BOURNE,

Appellant

v.

FAWAN WASHBURN,

Appellee

Appeal from the United States District Court for the District of Columbia

REPLY BRIEF ON BEHALF OF THE APPELLANT, RUBY C. BOURNE

HENRY W. LEEDS

J. TIMOTHY HOBBS

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I

PRELIMINARY STATEMENT

The instant appeal was initially taken by Appellant, Ruby C. Bourne, from a judgement finding Fawan Washburn guilty of negligence and finding James A. Keener not guilty of negligence. On his unopposed motion, James Keener was dismissed from this appeal on October 16, 1969. Accordingly, hereinafter Fawan Washburn will be referred to as Appellee.

The position of the Appellant is believed to be fully and adequately set forth in the Appellant's main brief. Accordingly, the Appellant's arguments will not be unnecessarily repeated, and this reply brief will attempt only to clarify the record and facts in the light of the Appellee's brief.

II

APPELLEE'S COUNTER-STATEMENT OF THE CASE

The Appellee, at page 2 of her brief, has criticized the Appellant's statement of the case as being incorrect and inadequate. However, the Appellee's counter-statement of the case suffers the same alleged infirmity.

The Appellee's counter-statement is generally correct, as far as it goes. The difficulty is that it does not provide the complete picture of the testimony of the various doctors.

Dr. Robert H. Groh testified that he took a history and made a "complete neurological examination of a clinical variety" on June 9, 1960 (R.249,252). He further testified that "I could find no evidence of organic neurologic disease and from her appearance and her statements I felt it was a rather strong emotional overlay in this problem she was having, but on this one interview I did not discuss her emotional problems or the origin or the full nature of them." (emphasis added) (R.253). For this "complete" examination and history, Dr. Groh charged only $25.00.

Equally significant is the fact that Dr. Groh's examination occurred more than eight months after the Appellant's accident on November 2, 1959 (R.32,46).

Notwithstanding the testimony of Dr. Groh that he could find no evidence of "organic neurological disease", the Appellant was placed by her regular physician in the Washington Hospital Center seven (7) days after the Groh examination for nearly a month from June 16, 1960 to July 10, 1960 (R.92,93,122). While at the hospital, Appellant received numerous medications (Appellant's Exhibit No. 3, R.93), and she was in head traction day and night (R.93).

Dr. William T. Spence saw the Appellant in October 1961, and recommended to Dr. Holtzman that Miss Bourne

receive psychiatric evaluation and treatment (R.273). For his services, Dr. Spence charged $10.00 (R.109). Significantly, the following month the Appellant was placed in Georgetown University Hospital and given extensive testing including another myleogram (R.273,278).

Dr. Alfred J. Luessenhop examined the Appellant during her admission to Georgetown University Hospital in November 1961 (R.273), as indicated in Appellee's counter-statement (Appellee's Brief, page 2). Of Appellant's automobile injury, Dr. Luessenhop stated "Apparently she sustained an acute flexion injury of the cervical spine. She was not rendered unconscious, but immediately thereafter began experiencing pain in the neck radiating to the occiput bilaterally." (R.273).

Dr. Luessenhop's examination revealed she was unable to move her cervical spine in any direction more than ten (10) degrees when asked to do so because of the drawing sensation (R.276). There was also marked tenderness to general palpitation over the rest of the spinose processes of the cervical and upper dorsal spine (R.276).

Dr. Luessenhop noted that the Appellant was unable to abduct the left shoulder greater than sixty (60) degrees because it produced pain in the shoulder blade (R.276). He

He also observed a rhythmic tremor in her left hand when she tried to perform skilled movements with the fingers (R.276).

Other observations of the Appellant by Dr. Luessenhop included tenderness over the entire lumbar spine (R.277), limited ability to raise her legs straight (R.277), and weakness in the plantar and dorsification of the left foot (R.277). He performed a myleogram on November 10, 1961 (R.278) and recommended psychiatric consultation to assist in evaluating her symptoms of pain (R.279), on the basis of his diagnosis that Appellant had a possible cervical and lumbar herniated disc and a conversion reaction (R.279).

Dr. Joseph T. Kaye of the National Orthopedic and Rehabilitation Hospital testifed that the Appellant was admitted to said hospital on April 10, 1962 and discharged on May 19, 1962 (R.280). Dr. Kaye expressly stated that the only point of reference for the complaint of the Appellant was the automobile accident in 1959 (R.282). Contrary to the Appellee's brief at page 3, Dr. Kaye testified that the diagnosis of the Appellant by the hospital was "whiplash injury of long-standing because of complications of psychosomatic disorder" (R.283). On the basis of this diagnosis, Appellant was placed in further traction and given sedatives, analgesics and muscle relaxants (R.283).

Dr. James L. Foy consulted with the Appellant on November 5, 1962 (R.285). He concluded that the Appellant's condition was probably so complicated that she was untreatable under the conditions of her being and remaining in the hospital whether in orthopedics or in psychiatry(R.286).

Dr. Foy stated that he felt that the Appellant was under a delusion that he, Dr. Foy, was "in league" with a Miss Washburn (R.285). Suffice it to note that the "delusion" was predicated on Dr. William J. Novak telling the Appellant that he had been sent to see the Appellant by Miss Washburn (R.232) and Dr. Foy was sent to see the Appellant at the request of Dr. Novak (R.233).

The aforementioned Dr. Novak never treated the Appellant contrary to the contention at page 3 of Appellee's brief (R.295-296). His testimony was solely to interpret hospital records during the Appellant's stay at D. C. General Hospital in 1962 (R.296).

Dr. Novak testifed that the Appellant received placebos, as well as prescription medications (R.299). The Appellee's brief, at page 3, is less than candid in summarizing the administration of placebos and their effect upon the Appellant. A more candid summary would have been that Appellant received numerous prescription medications on the

same days that she received placebos, and it is fair to assume that the effect of the medications were responsible for Appellant "resting quietly" rather than the placebos (R.156,167, Appellant's Exhibit 9). Also, contrary to Appellee's representation, a placebo is administered to a patient who has pain which may be either consiciously fabricated, or produced automatically - that is, unconsciously (R.302). With specific reference to the Appellant, Dr. Novak had " * * * the feeling that this was a psychologically induced pain." (R.303).

Dr. Harold Stevens was asked by the Court below to examine the Appellant in connection with a previous stage of this litigation (R.326).

Dr. Stevens saw the Appellant on June 28, 1967 (R.330), nearly seven and a half years after the automobile accident in issue on November 2, 1959. He found there was about 90% loss of power in the proximal muscles in the upper extremeties of her shoulder (R.333-334), a 20% loss of the right hand grip, a 90% loss of power in the left hand grip (R.334), and a 90% loss of power of both ankles (R.334). However, when the Appellant's attention was distracted from her ailments, she demonstrated an ability to regain her losses of power (R.334).

The conclusions of Dr. Stevens as stated at page 4 of Appellee's brief are quoted correctly, except that his conclusion that Appellant is not and has not suffered "from any psychosis" (R.336) is predicated on his finding that she had no paranoid delusions which can be construed as evidence of psychosis (R.335).

Turning to Dr. Saul Holtzman's testimony, it is fully summarized in the Appellant's main brief at pages 7 through 10. The additional summary of the doctor's testimony offered by the Appellee is generally correct, except that the Court's attention is particularly directed to Dr. Holtzman's opinion that the Appellant is not "malingering" (R.122). Also, the Appellee's brief purports to claim that Dr. Holtzman stated that a patient with traumatic neurosis "imagines he or she has pains that do not exist" (Appellee's brief, page 4). However, a more accurate summary would be the colloquy between Appellant's counsel below and Dr. Holtzman, as follows:

Q. "Doctor, the pain which you stated in response to His Honor's question as being an imaginery pain to the patient, is this pain, even if imaginery, something that she really feels? Is it pain to her?"

A. "Yes, it's pain to her. Let's say that she may not interpret it as pain, she

will interpret it as suffering, the equivalent of pain, some type of suffering." (R:167).

With regard to Dr. Rizzoli, the Appellee truncates the findings of this doctor to be that the Appellant's "glove-type sensory loss" was "abnormal" and "not physically neurologically possible" (Appellee's brief, pages 4-5). Dr. Rizzoli did make this conclusion, but he had alraady explained that the Appellant's problem was, in January 1961, a residual injury resulting from a strain of the cervical spine plus a considerable degree of emotional overlay (R.187). The residual was directly caused by the November 2, 1959 accident (R.187). The emotional overlay caused the Appellant "to overreact" to her injuries (R.188,196), thus explaining the "abnormal" finding. This condition continued to prevail even as of 1967 (R.205).

The remaining portion of the Appellee's counter-statement does not require further discussion, other than to correct an error at page 5 of Appellee's brief in stating "There is no doubt that Appellant suffered minor injuries in the automobile accident in question." The record does not support such a statement! The truth is that the Appellant's principal doctor, Dr. Holtzman, testified that:

> "I felt that she had been injured in the accident, sustained a sprain, fairly severe, of the neck primarily, also the back but apparently that cleared; that this was followed by a conversion hysteria or another equivalent term would be traumatic neurosis." (R.128) (Emphasis added)

Dr. Kaye testifed that Appellant had "a whiplash injury of long-standing because of complications of psychosomatic disorder" (R.283), and Dr. Leussenhop testified that her injury was apparently "an acute flexion injury of the cervical spine" (R.273). These are scarcely characterized as "minor injuries".

III
ARGUMENT

A. THE JURY AWARD WAS INADEQUATE AS A MATTER OF LAW.

The Appellee relies heavily upon the cases of Bryant v. Mathis, 107 US App. DC 339, 278 F.2d 19 (D.C. Cir., 1960) and Rankin v. Shayne Bros., Inc., 108 US App. DC 47, 234 F.2d 35 (D.C. Cir., 1956) in support of her contention that the jury award in the instant case was adequate as a matter of law. Both cases are clearly distinguishable from the facts before this Court in the instant proceeding.

In the Bryant case, the Plaintiff was awarded $4,250.00, notwithstanding special medical expenses of $3,407.32 and a claim for lost wages of $4,500.00. The Court noted that the jury's verdict exceeded her medical expenses by almost $850.00, and that the jury conceivably believed that the Appellant had been paid during her absence from work, thus explaining the jury's disallowance of recovery for lost earnings. In the instant case, the Appellant's medical expenses alone totaled $14,717.50, as correctly noted at page 5 of the Appellee's brief, but the jury awarded her only $3,000.00.

In the Rankin case, one must wonder, as the Court of Appeals did, at an award by a jury of only $123.90 for the negligent death of an infant. However, the Court did not wish to re-open the issue of the amount of damages for the death of an infant for the reasons that (1) the jury was apparently unable to find with sufficient certainty that substantial damages measurable in money grew out of the death of the infant and (2) the jury had been correctly instructed on the question of the damages to which the child was entitled.

In sharp contrast to the Rankin case, in the instant case the Appellant's damages for medical expenses and lost wages are measurable in money, and the Court did not properly instruct the jury on the issue of damages arising from the

Defendant's emotional difficulties caused by the November 2, 1959 accident, as will be shown more fully hereinafter.

In attempting to avoid a finding that the award of damages to the Appellant in the sum of $3,000.00 was inadequate as a matter of law, the Appellee argues that there is a logical basis for the jury award. Specifically, the jury could have concluded that the Appellant should be reimbursed only for the first hospital visit and the first few visits to Dr. Holtzman, without any consideration for the Appellant's lost wages since she was unemployed at the date of the accident (Appellee's brief, page 11). This is absurd! The record shows that the Appellant could have been gainfully employed after terminating her employment with United Fruit Company but for the accident caused by the negligence of the Appellee on November 2, 1959 (R.89,90,95, 96,97,209,212,213,214,219,220).

Appellee does not dispute the principle of law that a wrongdoer takes the victim as he finds him (Appellee's brief, page 10). In the instant case, the Appellant had a "preexisting psychic weakness", which was triggered by the November 2, 1959 accident into a conversion hysteria or traumatic neurosis (R.128,132-133). What the nature of the preexisting weakness was is unknown, but it is uncontroverted

that it existed (R.132). For all that is shown by the record, the weakness may have arisen from the preexisting emotional disturbance of the Appellant in being discharged from her employment earlier on the day of the accident (R.27).

Other doctors such as Dr. Groh and Dr. Rizzoli referred to emotional overlay rather than traumatic neurosis (R253,185-187,198). Dr. Leussenhop used the term "conversion reaction" (R.279). So far as the record shows, these terms all have the same meaning.

What the Appellant seeks to recover are her primary and secondary damages flowing from the November 2, 1959 accident. The jury apparently awarded what it felt were her primary damages and ignored the secondary damages - namely, the medical expenses and loss of wages resulting from the Appellant's traumatic neurosis.

Contrary to the Appellee's brief at page 10, the Appellant did request an instruction on the issue of her mental health, the pertinent part of which reads: 1/

1/ The full instruction only came to light subsequent to the Appellant's principal brief. Therefore, court appointed counsel for the Appellant hereby expressly objects to the Trial Court's ruling on the Appellant's requested instruction number 4 which ruling appears at R.319. From the transcript it appeared that this instruction related to "costs for future treatments" (R.319). It now develops that the full instruction was broader. Court appointed counsel apologizes to the Court and to Counsel for Appellee on not having obtained the full instruction previously.

> You will also consider the health, the physical ability of Miss Bourne before the injuries complained of as compared with her present condition and consequence of such injury.
>
> You should also consider any permanent disabilities sustained by her by reason of these disabilities.
>
> You should also give consideration and value to the pain, discomfort, physical suffering and mental worry or anguish which she endured, or from which she will reasonably suffer in the future. In this connection, you are informed that the law permits recovery, not only for physical pain and suffering but for mental anguish and anxiety.

It is true that the record fails to show any objection by Appellant's counsel below to the Judge's ruling on Appellant's Instruction 4. This absence, however, is readily explained by the facts that (1) the Trial Court's denial of the instruction was directed to "costs for future treatments" (R.319) and (2) Appellant's counsel felt that the balance of the instruction would be incorporated into the Judge's instructions to the jury (R.319-320).

The Appellant's Instruction Number 4 would have brought into issue the question of whether Appellant was entitled to recover for her secondary damages - that is, the damages resulting from her emotional difficulties. The instruction actually given by the Trial Court precluded any such consideration (R.351). The fact that Appellant's

counsel below made no objection to the instruction actually given is not surprising in view of the Trial Judge's comment:

> "I always dislike it very much when counsel asks to object for the record." (R.355).

The Appellee also argues that the Appellant should not be entitled to recover her damages resulting from the emotional difficulties caused by the November 2, 1959 accident for the reason that she did not try her case on this theory. It is a complete answer to the Appellee's contention that the issue was put before the jury by the medical testimony adduced. It is true that the Appellant essentially sought to recover her damages predicated on actual medical expenses resulting from actual pain and suffering. The Appellee was the party who brought out that much of the pain and suffering of the Appellant was rooted in emotional difficulties, rather than physical ones. But it was still pain and suffering!

The Appellee attempts to justify the low award to the Plaintiff on the basis that her credibility was so sufficiently impeached that the jury could take this into account in assessing damages. (Appellee's brief, page 11). But impeachment would not have been in question if the Trial Court had not interjected certain prejudices in the course of the trial to suggest that the Appellant was faking her injuries.

These prejudices are more fully set forth in the Appellant's principal brief, at pages 41-45. With the sole exception of Dr. Stevens, not one of the numerous doctors seen by the Appellant felt that she was "faking" or "malingering" in connection with her injuries. In fact, her principal doctor, Dr. Holtzman, testified affirmatively that Appellant was not malingering (R.129). Also, from the testimony of record, it is believed clear that the Appellant has suffered and is continuing to suffer pains--whether they be from objective physical ailments or whether they be subjectively but unconsciously or psychologically induced (R.167,302,303).

At page 12 of the Appellee's brief, the Appellee claims that the Appellant's medical expenses were almost entirely the result of her own exaggeration and imagination and that her claimed loss of earnings was not in any substantial degree caused by the injuries which she suffered in the automobile accident. The fallacy of this contention is that medical expenses resulting from her own exaggeration are compensible if the exaggeration and imagination are a proximate result of the negligent act of the Appellee. To support its contention of exaggeration and imagination on behalf of the Appellant, the Appellee relies solely upon the testimony of Dr. Stevens that there was a "conspicuous conscious element present in her psychological complaints"

and that this pattern of injury "was not likely to produce a traumatic neurosis" (Appellee's brief, page 12). It is significant that Dr. Stevens gave his opinion in connection with a court order of Judge Keech to determine the competency of the Appellant. His comment regarding her psychological complaints having a "conscious conspicuous element present" was gratuitous since his examination was to determine the Appellant's competency. It was also contrary to the testimony of the other doctors in this case. Similarly, his testimony that the Appellant's injury "was not likely to produce a traumatic neurosis" is directly contrary to the testimony of the numerous other doctors in this case, as hereinafter shown.

The Appellee also attempts to dismiss the damages to the Appellant resulting from her emotional problems on the basis that they were not causally connected to the accident on November 2, 1959 (Appellee's brief, page 13).

Without belaboring the matter, the Appellant's doctor, Dr. Holtzman, testified that he had not noted any emotional instability other than the ordinary or average in the Appellant prior to the November 2, 1959 accident (R.133). From the time of the accident to the present, all of the Appellant's pains have been directed to the various spots affected by the accident. Dr. Kaye also testified that

the only point of reference for the Appellant's complaints was the 1959 automobile accident (R.282) in which the Appellant suffered "whiplash injury of long-standing because of complications of psychosomatic disorder" (R.283). Dr. Rizzoli testified that the Appellant was suffering through 1967 from the residuals of the November 2, 1959 accident, with complications of emotional overlay or overreaction (R.187,193,196,197). Clearly, a causal connection was established.

Putting the case in the proper perspective, it is submitted that the jury felt that the Appellant was "faking" her injuries, particularly in view of the emotional problems from which the Appellant was suffering causing her to make a bad witness, as illustrated by the comments in the Appellee's brief at page 11. Thus, the Appellee is attempting to avoid the full liability for the consequences of her act of negligence for the very reason that her acts have created such an emotional disburbance that the Appellant is no longer able to present herself properly before a jury.

With the foregoing in mind,it is submitted that the jury award in the instant case was inadequate as a matter of law, and it is urged that there be a partial remand to the Trial Court for a new trial limited to the issue of the

Appellant's damages and, in view of Appellee's brief, possibly the re-examination of the proximate cause of the emotional difficulties with the accident in issue. Such a remand is in full accord with this Court's decisions in the cases of Washington Gas Light Co. v. Connolly, 94 US App. DC 156, 214 F.2d 254(D.C. Cir., 1954); and Parrish v. United States, 123 US App. DC 149, 357 F.2d 828 (D.C. Cir., 1966).

In the Connolly case, the Court affirmed the liability of the Defendant, but remanded for a new trial on issue of the amount of damages. Thus, as stated at page 256 of 214 F.2d:

> "We set aside, however, the award of $12,000.00 to Appellee Connolly and remand the question of amount, though not that of liability, for a new trial. It is well settled that we may thus divide the issues and limit the scope of a new trial. * * * (Citations) * * *".

Similarly, in the Parrish case, the Court of Appeals was faced with a situation not unlike the one before the present Court. In the Parrish case, the District Court found the Defendant liable for negligently operating an automobile, and awarded the Plaintiff $300.00 for personal injuries. The injuries were limited to actual physical injuries. The Appellant sought to establish that the physical

injuries had given rise to a neurotic condition which had eventually rendered her unable to continue her employment. There was also other evidence which suggested that the Appellant's neurotic ills were not necessarily the result of her physical injuries. The District Court made no findings on this point. Instead, it concluded that the law was that only a "substantial" physical injury could be made the occasion for an award of damages in respect of a consequent nervous disorder. The Court of Appeals specifically rejected the distinction between a "substantial" and an "insubstantial" physical injury, requiring instead a "finding whether Appellant has established by a preponderance of the evidence that her nervous troubles were attributable to the injuries sustained in the accident" (357 F.2d, page 829). The holding of the Court is succinct and directly applicable to the instant case - namely:

> "The case is remanded to the district court for re-examination of its findings in the light of this opinion and for a finding whether Appellant's alleged psychiatric disorders are a proximate result of the physical injuries sustained by her in the manner already found by the court. If an affirmative finding is made, the issue of damages is also to be re-examined" (357 F.2d, page 829).

It will be noted that the Court in the Parrish case did not remand the case for a new trial on the issue of liability. The same result should prevail in the instant action.

B. THE JURY AWARD WAS A COMPROMISE VERDICT.

At the outset, the Appellee evidences a failure to recognize alternative pleading and argument. If this Honorable Court should find that the damages awarded to the Appellant are inadequate as a matter of law, then a new trial is requested limited to the issue of damages and possibly to the issue of the proximate cause between the Appellant's emotional problems and the Appellee's negligent act. On the other hand, if the Court should find that there was a compromise jury verdict, then there would have to be a new trial on all issues, with the exception of the liability of James A. Keener, one of the original defendants. Insofar as Keener is concerned, no appeal was taken by Appellee Washburn from the jury verdict finding Keener free of negligence. If Washburn had believed that Keener was negligent and liable to Washburn, it was Washburn's duty to have appealed the verdict in favor of Keener, which is now res judicata against Washburn. But this fact should not prejudice in any way the rights of the Appellant, Ruby C. Bourne, since Washburn would have been jointly and individually liable even if the jury had found both Keener and Washburn guilty of negligence.

The Appellant will not repeat the arguments made in connection with a compromise jury in her principal brief,

which are believed to respond fully to the questions raised by the Appellee's brief, pages 14-17 with one exception. The Appellee refers to the decision in Schuevolz v. Roach, 58 F.2d 32 (4th Cir., 1932; cert den 287 US 662 (1932), where the Appellate Court found that the verdict for the Plaintiff had to be set aside on the dual grounds of gross inadequacy and an inference of a compromise verdict. Because of the inference of a compromise verdict, the entire case was submitted for a new trial. This is the result which the Appellant should obtain if it is found, as the Appellant believes, that there was a compromise verdict. The Appellant is not attempting to bifurcate the trial on this ground. Of course, the Appellant does properly seek to bifurcate the trial if the Court finds only that the damages are inadequate as a matter of law.

C. PREJUDICE OF THE TRIAL JUDGE AGAINST THE APPELLANT.

It is necessary to review the record in its context to determine the subtle prejudice which existed in the instant proceeding. This prejudice is set forth fully in the Appellant's principal brief. There is no necessity for repeating the instances here. Notwithstanding, direct rebuttal of some points by the Appellee are required.

At page 18 of its brief, the Appellee asks how the Appellant can be damaged by the Court asking if "traumatic

neurosis" in "plain, ordinary simple English" means "that the patient imagines that he or she has pain that does not exist?" (R.164) The doctor answered the Court's question affirmatively, but attempted to explain his answer. The Court then interjected:

> The Court: But doctor, I want to get away from science for a moment. I am a plain, blunt man and I like simple explanations.
>
> Do all these terms that we have been discussing like traumatic neurosis and conversion hysteria and so on mean that the patient imagines that he or she has pains that do not exist?
>
> The Witness: That is right, sir. (R.164)

At first blush, it would appear that a conversion hysteria or traumatic neurosis refers to the patient imagining a pain that does not exist. But this is not the true meaning of the doctor's response for, as stated later in the course of the examination:

> Q. Doctor, the pain which you stated in response to His Honor's question as being an imaginery pain to the patient, is this pain, even if imaginery, something that she really feels? Is it pain to her?

A. Yes, it's pain to her. Let's say that she may not interpret it as pain, she will interpret it as suffering, the equivalent of pain, some type of suffering (R.167).

Paraphrasing the foregoing, the Court attempted to relate the Appellant's traumatic neurosis with imaginary pains, but a careful reading of the real meaning of the term reveals that there is truly pain or suffering to the person with the traumatic neurosis. The nature of the Court's questioning is believed to have subtlely persuaded the jury from believing that there were any real pains to the Appellant because they were emotional rather than physical in nature!

The subtle prejudice was even more pronounced on the jury when it was being instructed by the Trial Judge, at which time he summarized the facts in part as follows:

> "She claims that her neck and shoulder pain continued, and that these pains were the result of the accident.
>
> On the other hand, the Defendants contend that the continuation of these pains after her first hospitalization was imaginary, that these pains are imaginary and do not exist. In medical language, the testimony is that she was suffering from a converse hysteria or traumatic neurosis. This was the diagnosis given by her

> own doctor, who testified that she exaggerated her pains, and that she imagines that she has pains that do not exist." (R.352-353).

The summary of the Trial Judge to the jury of the testimony of the Appellant's own doctor is believed to be less than fair. It places all of the pain and/or suffering of the Appellant in the realm of imagination, giving the jury no choice but to find that the Appellant was "faking" or "malingering", which is directly contrary to the overwhelming evidence in this case.

At page 19 of the Appellee's brief, it is urged that if there had been any impropriety in the Court's questioning of any witness, Appellant's competent counsel below would have made prompt and vigorous objection. Appellant's present counsel have absolutely no idea why an objection was not made to the Trial Judge's questioning. It must be assumed that the general reputation of the Trial Judge regarding objections, as evidenced by his own comment that: "I always dislike it very much when counsel asks to object 'for the record'." (R.355) must have discouraged Appellant's counsel below from making an objection.

Turning to the actual instructions of the Trial Court to the jury, they are fully repeated at pages 19-21

of Appellee's brief. The Court is respectfully solicited to read these instructions with care.

While it is dangerous to take material out of context, the following portions of the instructions are believed to be particularly significant:

> " * * * she is entitled to recover damages only for the injuries she actually sustained as a result of the accident and nothing else."(R.351) (emphasis supplied)
>
> * * *
>
> You are not to consider any expenses or any pain or any other matters except those that were the result of the accident.* * * (R.351)
>
> * * *
>
> She remained in the Washington Center slightly over two weeks and her bill amounted to $455.50. She then went home.
>
> She went to numerous doctors from time to time, she went to various hospitals from time to time. * * * (R.352)
>
> * * *
>
> In medical language, the testimony is that she was suffering (the Appellant) from a conversion hysteria or a traumatic neurosis. This was the diagnosis given by her own doctor, who testified that she exaggerated her pains, she imagines that she has pains that do not exist. (R.353) (emphasis supplied)

* * *

> Your award should be fair compensation; no less, of course, but no more than the amount that would fairly compensate her for the injuries that she actually sustained and that actually flowed from the accident, and for nothing else (R.353)

If the selected portions of the Trial Court's instructions are carefully read, it will be observed that there is a pattern which indicates that the Trial Judge felt that the Appellant was "faking" her injuries subsequent to the initial hospitalization. By strictly limiting the issue of damages, there was an indirect elimination of any question of pain and suffering resulting from the Appellant's conversion neurosis.

Finally, the Appellee argues that the Appellant should not now be heard to urge that she is entitled to a new trial on the theory that Appellee's action "aggravated or activated a neurosis heretofore dormant in the victim" when such an issue was not properly tendered to the Court. (Appellee's brief, page 21). The fact of the matter is that the issue was tendered to the Court by the Appellee herself, who attempted to bring out the Appellant's emotional problems. Thus, it is clear that the Appellee wishes to "have its cake and eat it too" on this issue. The Appellee used the Appellant's emotional trauma as a sword to reduce

the amount of her damages to the Appellant, and now as a shield against a new trial. Since the matter was brought before the Trial Court by the Appellee, Appellant's counsel does seriously urge for a new trial based upon the failure of the Trial Court to instruct on an issue which was properly before it.

Finally, this case is unique. Counsel for the Appellant are Court-appointed, and believe it to be their duty to review the record and to bring to the Appellate Court's attention where error below occurred for the purpose of insuring that justice be done. This Honorable Court should not now confine itself to the niceties of technical objections or the lack thereof in its pursuit to do justice to all parties.

IV

CONCLUSION

For the reasons expressed herein and in the Appellant's main brief, the Appellant prays that the following relief be granted.

1. That on the strength of the record, the Plaintiff's award be increased to $36,857.50, with a remand to the District Court to determine the

Plaintiff's damages for pain or suffering and anticipated medical expenses, as well as loss of future earnings; or

2. That the case be remanded for a new trial on the issue of damages only; or
3. That the case be remanded for a new trial on the issue of damages and the proximate cause of the automobile accident in issue to the Appellant's traumatic neurosis; or
4. That the case be remanded for a new trial on all issues; or
5. For such further and other relief as the Court may deem just and proper.

Respectfully submitted,

Henry W. Leeds

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and
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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing Reply Brief on Behalf of Appellant were served on J. Roy Thompson, Jr., Esq., counsel for Appellee Fawan Washburn at his last known address of record, c/o Thompson McGrail & O'Donnell, 400 Union Trust Building, Washington, D. C. 20005, this 28th day of November, 1969 by first class mail, postage prepaid.

It is further certified that one (1) copy of said Reply Brief was mailed to the Appellant, Ruby C. Bourne, c/o her last known address, 2013 New Hampshire Avenue, N. W., Apt. 508, Washington, D. C. by first class mail, postage prepaid, on November 28, 1969

Henry W. Leeds

HENRY W. LEEDS

Court-Appointed Counsel for
APPELLANT, RUBY C. BOURNE